108-260

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 218.

CHRISTOPHER F. HAMPTON, ADMINISTRATOR OF FRANK HAMPTON, DECEASED, AND MARIA C. OTIS AND EMMA S. WELSMAN, EXECUTRIXES OF JAMES WELSMAN, DECEASED, APPELLANTS,

vs.

J. L. PHIPPS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED MAY 1, 1880.

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1 No. 1.

THE UNITED STATES OF AMERICA,
District of South Carolina, to wit:

At a circuit court of the United States for the fourth circuit, in and for the district aforesaid, begun and holden at Columbia, in the district aforesaid, on the fourth Monday in November, A. D. 1877, before the honorable Hugh L. Bond and the honorable George S. Bryan, judges of the said United States for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

J. L. PHIPPS, ON BEHALF OF HIMSELF AND others, the creditors of George A. Trenholm and James T. Welsman, deceased,

vs.

THEODORE D. WAGNER, WILLIAM L. TRENholm, in his own right and as surviving copartner of the firm of George A. Trenholm & Son, and as executor of George A. Trenholm, deceased; Wilmot G. DeSaussure and
2 Robert Gourdin, executors, and Emma S. Welsman, executrix of the said James T. Welsman; Anna Helen Trenholm, widow of the said George A. Trenholm; Emily St. Pierre Hazzard, and William Miles Hazzard, her husband; Alfred Glover Trenholm; Eliza Macbeth and Alexander Macbeth, her husband; Francis H. Trenholm; Emma Josephine Walker and Legare J. Walker, her husband; Celestine Robertson McCullough, and Derrill H. McCullough, her husband; Emily St. Pierre Morgan, an infant of tender years; Caroline Napier Welsman; and Christopher F. Hampton, administrator of the estate of Frank Hampton, deceased.

Be it remembered that heretofore, to wit, the tenth day of October, in the year of Lord one thousand eight hundred and seventy-seven, the said complainant impleaded the said defendants in a bill of complaint, which bill of complaint is in the words and tenor following:

3 No. 2.

Bill of complaint.

THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

In equity.

To the judges of the circuit court of the United States for the district of South Carolina:

J. L. Phipps, of New York, and a citizen of the State of New York,

brings this his bill for and on behalf of himself and all other the creditors, as holders of the obligations hereinafter mentioned of George A. Trenholm and James T. Welsman, both late of Charleston, in the State of South Carolina, deceased, who shall come in and seek relief by and contribute to the expense of this suit against Theodore D. Wagner, William L. Trenholm in his own right and as surviving copartner of the firm of George A. Trenholm & Son, and as executor of George A. Trenholm, deceased; Wilmot G. DeSaussure and Robert N. Gourdin, executors, and Emma S. Welsman, executrix of the said James Welsman;* Anna Helen Trenholm, widow of the said George A. Trenholm; Emily St. Pierre Hazzard and William Miles Hazzard, her husband; Alfred Glover Trenholm; Eliza Macbeth and Alexander Macbeth, her husband; Francis H. Trenholm; Emma Josephine Walker and Legare J. Walker, her husband; Celestine Robertson McCullough and Derrill H. McCullough, her husband; Emily St. Pierre Morgan, an infant of tender years; Caroline Napier Welsman, all

4 of Charleston aforesaid, and citizens of the State of South Carolina; Christopher F. Hampton, administrator of the estate of Frank Hampton, deceased, and a citizen of the State of Mississippi, but found within the district of South Carolina; and thereupon your orators complain and say:

That heretofore Theodore D. Wagner and William L. Trenholm, jointly and severally, made and executed their certain bonds or written obligations, under seal, bearing date of the first day of January, A. D. 1868, to James Robb and Charles T. Lowndes, trustee, in such penal sums and conditioned for such respective amounts as in and by the said respective bonds, reference being thereunto had respectively will fully appear, but conditioned for the payment of the aggregate sum of seven hundred and ten thousand dollars ($710,000), in four series, as follows:

First. One series of said bonds, marked series No. 1, conditioned for the payment of one hundred and seventy-seven thousand five hundred dollars on the first day of January, 1870.

Second. A second series of said bonds, marked series No. 2, conditioned for the payment of one hundred and seventy-seven thousand five hundred dollars on the first day of January, 1871.

Third. A third series of said bonds, marked series No. 3, conditioned for the payment of one hundred and seventy-seven thousand five hundred dollars on the first day of January, 1872.

Fourth. A fourth series of said bonds, marked series No. 4, conditioned for the payment of the sum of one hundred and seventy-seven thousand five hundred dollars on the first day of January, 1873; with interest on all of said bonds, to be computed from the said first day of January, 1868, at the rate of six per centum per annum, payable on the first day of January, 1870, and thereafter annually on the first day of January in each year.

5 And your orators further shew unto your honors that the said George A. Trenholm and James T. Welsman did, in and by their obligations in writing, duly endorsed under their hands and seals upon all and each of the said bonds respectively, jointly and severally, guarantee

* 1st page, 18th line, after the words "James T. Welsman," insert "Maria C. Otis and Emma S. Welsman, executrixes of James Welsman, deceased."

and become bound for the payment of the same when they became due, together with all interest accrued thereon.

That by an endorsement on certain of the said bonds so guaranteed as aforesaid, the said James Robb and Charles T. Lowndes, trustees, assigned, set over, and transferred the same, and directed payment thereof to be made to the holder thereof; and your orator, J. L. Phipps, became and is the lawful owner and holder of the same, that is to say of the following of said bonds:

1. Bond marked B, No. 549, series No. 2, in the penal sum of four hundred dollars; conditioned for the payment of two hundred dollars lawful money of the United States of America, on or before the first day of January, A. D. 1871, with interest thereon at the rate of six per centum per annum from the first day of January, A. D. 1868, dated the first day of January, A. D. 1868.

2. Bond marked B, No. 550, series No. 2, in the penal sum of four hundred dollars; conditioned for the payment of two hundred dollars lawful money of the United States of America, on or before the first day of January, A. D. 1871, with interest thereon at the rate of six per centum per annum from the first day of January, A. D. 1868, dated the first day of January, A. D. 1868.

3. Bond marked B, No. 553, series No. 2, in the penal sum of four hundred dollars; conditioned for the payment of two hundred dollars lawful money of the United States of America, on or before the first day of January, A. D. 1871, with interest thereon at the rate of six per centum per annum from the first day of January, A. D. 1868, dated the first day of January, A. D. 1868.

4. Bond marked B, No. 554, series No. 2, in the penal sum of four hundred dollars; conditioned for the payment of two hundred dollars
6 lawful money of the United States of America, on or before the first day of January, A. D. 1871, with interest thereon at the rate of six per centum per annum from the first day of January, A. D. 1868, dated the first day of January, A. D. 1868.

5. Bond marked B, No. 1010, series No. 3, in the penal sum of one thousand dollars; conditioned for the payment of five hundred dollars lawful money of the United States of America, as aforesaid, on or before the first day of January, A. D. 1872, with interest thereon at the rate of six per centum per annum from the first day of January, A. D. 1868, dated the first day of January, A. D. 1868.

6. Bond marked B, No. 1027, series No. 3, in the penal sum of one thousand dollars; conditioned for the payment of five hundred dollars lawful money of the United States of America, on or before the first day of January, A. D. 1872, with interest thereon at the rate of six per centum per annum from the first day of January, A. D. 1868, dated the first day of January, A. D. 1868.

7. Bond marked B, No. 695, series No. 4, in the penal sum of one thousand dollars; conditioned for the payment of five hundred dollars lawful money of the United States of America, on or before the first day of January, A. D. 1873, with interest thereon at the rate of six per centum per annum from the first day of January, A. D. 1868, dated the first day of January, A. D. 1868.

8. Bond marked B, No. 706, series No. 4, in the penal sum of one thou-

sand dollars; conditioned for the payment of five hundred dollars lawful money of the United States of America, on or before the first day of January, A. D. 1873, with interest thereon at the rate of six per centum per annum from the first day of January, A. D. 1868, dated the first day of January, A. D. 1868.

That no interest on the said bonds so held by your orator, J. L. Phipps, has been paid since the first day of January, A. D. 1876; and that the whole of the said bonds are still justly due and owing to your orator, J. L. Phipps, together with the interest thereon from the first day of January, A. D. 1876, at the rate of seven per centum per annum.

7 And your orators further show unto your honors that they are not informed as to how many of the said bonds so guaranteed as aforesaid are still outstanding and unpaid; but that the conditions of all of the same that are or may be still outstanding and unpaid have been broken; and the whole of the same, with the interest accrued thereon, is now due and unpaid.

And your orators further shew unto your honors that in and by an agreement between the said George A. Trenholm and James T. Welsman, had at the time of the execution of the aforesaid guarantees and endorsements by them made on the said bonds, it was agreed and understood that as between them, that the said George A. Trenholm should be liable on account of the said guarantees and endorsements on the said bonds to the extent of four hundred thousand dollars ($400,000), and the said James T. Welsman to the extent of three hundred and ten thousand dollars ($310,000); and that the said George A. Trenholm and James T. Welsman should each to secure to the bondholders the payment of the said bonds, and to save each the other harmless on account of any claim by reason of the said guarantees and endorsements, beyond the proportion so agreed to be assumed by each; that each should convey to the other, by way of mortgage, such property to him belonging as would secure each other against any claim on account of the said guarantees and endorsements beyond the said proportion thereof assumed by each; and would secure to the holders of the said bonds the proportion of the sums assumed by each of them, the said George A. Trenholm and James T. Welsman; for the payment of which said proportion each would and did execute to the other certain security by way of mortgage, as hereinafter specially set forth. And that the said George A. Trenholm and James T. Welsman did in and by a certain memorandum of agreement, dated the third day of May, A. D. 1869, fully set forth, acknowledge, and ratify in writing the said agreement; and did mutually covenant for the performance thereof.

8 And your orators further shew unto your honors that in pursuance of the said agreement, and in pursuance of the covenants therein expressed and contained, and to secure the performance of the same as aforesaid, the said George A. Trenholm and James T. Welsman did, on the said third day of May, 1869, execute their respective deeds in writing, under seal, whereby they respectively conveyed, each to the other, by way of mortgage, the following real estate; that is to say, the said George A. Trenholm conveyed, by way of mortgage, to the said James T. Welsman, the following, to wit:

All that lot, piece, or parcel of land, with buildings thereon, situate,

lying, and being at northwest corner King and Wentworth streets, in the city of Charleston, butting and bounding north on lands of Lazarus; south on Wentworth street; east on King street, and west on lands of , No. 259, per plat of lands of Mordecai Cohen.

Also, all those other two lots, pieces, or parcels of land adjoining each other, with the three story brick dwelling, situate, lying, and being on the north side of Lamboll street, in the city of Charleston, butting and bounding north on lands of W. B. Pringle, formerly William Alston; south on Lamboll street; east on lands of R. O'Donnell, late of Mrs. Thomas, and on lands of Baker, late of the Rev. Ed. Jenkins.

Also, all that other lot, piece, or parcel of land, situate, lying, and being in Broad street, No. 31, with buildings thereon, in the city of Charleston, butting and bounding north on Broad street; east on land formerly of T. M. Hume; west on lands owned by Marshall; south on lands of estate Col. G. W. Brown.

Also, all that other lot, piece, or parcel of land, with house thereon, situate, lying, and being a tthe corner of East Bay and Elliott streets, in the city of Charleston, butting and bounding front on East Bay street; north on Elliott street; east on a passage common to all the lots and buildings bounding the same; south on another with like conditions.

9 Also, all that other lot, piece or parcel of land, with house thereon, situate, lying, and being on south side of Hayne street, No. 36 in Payne's plat, No. 16 on city plat, in the city of Charleston, butting and bounding north on Hayne street twenty-two, (22) feet one (1) inch; east on party wall separating it from lot No. 37 one hundred and seventeen (117) feet two (2) inches; south partly on lots Nos. 61 and 62 twenty-two (22) feet one (1) inch; and west on party wall separating it from No. 35, one hundred and seventeen feet (117) feet two (2) inches.

Also, all that moiety or half of lot, piece, or parcel of land, situate, lying, and being on the south side of Broad street (being easternmost moiety) in the city of Charleston, which measures in the whole in front and north on Broad street fifty-four (54) feet; east on lands formerly of David Ramsey, lately of Mordecai Cohen, and now of Thomas W. Mordecai, one hundred and forty (140) feet; south by lands formerly of Thomas Waring fifty-four (54) feet; and west by lands formerly of Stephen Lee, afterwards of Paul Smizer, and lately of Lockwood, one hundred and forty (140) feet, with the use of a passageway of seven (7) feet and six (6) inches, common to both moieties.

Also, all that other lot, piece, or parcel of land, with the buildings thereon, situate, lying, and being on the east side of State street, opposite Chalmers street, in the city of Charleston, butting and bounding north on lands of Union Bank; south on lands of M. McBride; east by lands of Z. B. Oakes; and west by State street.

Also, all that other lot, piece, or parcel of land, with house thereon, situate, lying, and being on the north side of Beaufain street, No. 6, in the city of Charleston, butting and bounding south on Beaufain street; east on lands of Andrew Cunningham; and west on lands of estate James Calder.

Also, all that other lot, piece, or parcel of land, with house thereon, situate, lying, and being on south side of Society street, in the city of Charleston, butting and bounding north by Society street thirty-six (36) feet;

10 east by lands of John Lafar one hundred (100) feet; south by

lands of thirty-six (36) feet; and west by lands of A. N. Bell one hundred (100) feet.

Also, all that other lot, piece, or parcel of land, and buildings thereon, known as "Carolina Coffee House," and lot adjoining, situate, lying, and being in Tradd street, in the city of Charleston, butting and bounding south on Tradd street; west on lands formerly of Adam Ewing; north on lot hereinafter mentioned; and east on Bedon's alley. Lot adjoining, bounded east on Bedon's alley; south on Carolina Coffee House; west on lands formerly of Wilson; north on lands formerly of Martin E. Munro.

Also, all those other four lots, pieces, or parcels of land, with the buildings thereon, situate, lying, and being at southwest corner East Bay and Hasel street, in the city of Charleston, butting and bounding east on East Bay street; north on Hasel street; west on lands of H. Bischoff; south on land of Z. Miller.

Also, all that other lot, piece, or parcel of land situate, lying, and being on the east side of Church street, in the city of Charleston, butting and bounding east by lands of Wm. Bell; south by lands of Nathaniel Russell and Jane Livingston; west on Church street; north on lands of Geo. Kinloch and T. W. Mordecai, and known as No. 460.

Also, all that other lot, piece, or parcel of land, with house thereon, situate, lying, and being on west side of East Bay street in the city of Charleston, butting and bounding south on lands of W. L. Porter; north on lands of James Lamb; west on lands of Heilbron; east on East Bay street; with right of carriage-way through Longitude Lane and Mitchell's Cotton Press lot.

Also, all that other lot, piece, or parcel of land, situate, lying, and being on Concord street, in the city of Charleston, measuring on said street sixty-three (63) feet, on south line fifty (50) feet; then north thirty-three feet; then running east forty (40) feet; thence north on east line thirty (30) feet, and on the north line ninety (90) feet; recorded book No. 14, 2, page 36, September 7th, 1863.

11 Also, all that other lot, piece, or parcel of land, situate, lying, and being on south side of Bull street, butting and bounding front on Bull street forty-one (41) feet; depth one hundred and fifty-seven (157) feet; east on lands now or lately of ; west on lands formerly of John Dawson, but now of ; north on Bull street.

Also, all that other lot, piece, or parcel of land, situate, lying, and being on east side of Friend street, in the city of Charleston, butting and bounding north by lands of Rt. Rev. Dr. Lynch; south by lands of Mrs. Belser; east by land of Rt. Rev. Dr. Lynch; west by Friend street.

Also, all that other lot, piece, or parcel of land, situate, lying, and being at northeast corner Bogard and Rutledge streets, in the city of Charleston, butting and bounding north by lands of Harriett Evans, and east by lands of Amarintha Elliott.

Also, all that other lot, piece, or parcel of land, situate, lying, and being on south side of Cumberland street, in the city of Charleston, butting and bounding east by lot formerly of Dr. J. W. Schmidt, but now of Dr. Robert Lebby; south by cemetery of Circular Church; west by lot now or late of F. G. Rolando.

Also, three undivided fourth parts of the whole of those four wharves and four docks (comprising three wharves), excepting two lots conveyed

to R. S. Rhett and Robson, situate, lying, and being in the city of Charleston, with lots, buildings, and stores thereon, known as Atlantic wharves.

Also, three undivided fourth parts of the whole of the following lots, pieces, or parcels of land; one lot on the north side of Champney street, in the city of Charleston, conveyed by Nathaniel Fields to Mills and Beach, recorded in book H, No. 12, page 51; lot on south side of Gillon street, in the city of Charleston, recorded in book G, No. 12, page 446–8; one lot covered with part of Dewees' wharf, recorded in book M, No. 12, page 10; two lots on north side of Champney street, recorded in book
12 R, No. 12, page 116; one lot corner Prioleau and Exchange streets, recorded in book F, No. 14, page 300.

Also, three undivided fifth parts of the whole of the Pavilion Hotel, situate, lying, and being at the northwest corner of Meeting and Hasel streets, in the city of Charleston, butting and bounding north by lands of Mazyck; east on Meeting street; south on Hasel street, and west on lands of John Thompson.

Also, all that lot, piece, or parcel of land, with the buildings thereon, situate, lying, and being on Rutledge avenue, in the city of Charleston, butting and bounding north by Radcliffe street; east by Smith street; south by property of Mr. Magwood; and west on Rutledge avenue.

Also, one-fourth part in Central wharves and buildings thereon, situate, lying, and being in the city of Charleston, and butting and bounding north by custom-house wharf; east by channel of Cooper River; south by Accomodation wharf, the property of John Ferguson; and west by property of the estate of Faber and Mordecai and Company, and by property of the State Bank.

Also, one-fourth part of store and lot No. 118 East Bay, situate, lying, and being in the city of Charleston, butting and bounding north by property of estate of Jeffords; east by Central wharves; south by property of C. Lillienthal; and west by East Bay.

And the said James T. Welsman conveyed to the said George A. Trenholm, by way of mortgage, the following real estate, to wit:

All that lot, piece, or parcel of land, with the buildings thereon, situate, lying, and being in the city of Charleston, on east side East Bay street, butting and bounding west by East Bay street; south and east by lands of proprietors of Southern wharf; north by the south street leading to Commercial wharf.

Also, all that other lot, piece, or parcel of land; with the buildings
13 thereon, situate, lying, and being in the city of Charleston, on east side of East Bay street, butting and bounding west by East Bay street; south by south street leading to Commercial wharf; east by lands of the proprietors of Commercial wharf; north by the north street leading to Commercial wharf.

Also, all that other lot of land and house, situate, lying, and being on east side of East Bay street, in the city of Charleston, butting and bounding north by lands of trust estate Elizabeth Condy; east by land of ; south by land of James Mathews; west by East Bay street.

Also, all that other lot, piece, or parcel of land, and buildings thereon, situate, lying, and being on the east side of East Bay street, in the city of Charleston, butting and bounding north by lands of Street and West; south by lands of George A. Locke; east by lands of Rhett & Robson;

west by East Bay street; recorded mesne conveyance office, book T, No. 14, page —, February 8th, 1864.

Also, all that other lot, piece, or parcel of land, with buildings thereon, situate, lying, and being on the east side of King street, No. 50, butting and bounding north by lands of C. B. Northrop; east on land of Nathaniel Russell; south on lands of John Duncan; and west on King street.

Also, lot of land north of the above described, butting and bounding north by land of McDonald and Scotch Presbyterian Church; east on lands of Alston; south on lot above described; and west on King street.

Also, all that other lot, piece, or parcel of land, with buildings thereon, situate, lying, and being on the north side of Society street, in the city of Charleston, butting and bounding north by lands of estate Matthews; east on lands of H. R. Stocker and St. Stephen's chapel school lot; south on Society street; and west on lands of J. C. Burckmyer.

Also, all that other lot and house, situate, lying, and being on west side of East Bay street, No. 43, in the city of Charleston, butting and bounding east on East Bay street; south on lands of Caspar Shult; west on lands hereinafter described; north on lands of Daniel Stevens.

14 Also, another lot of land attached to above, measuring in width forty (40) feet, and in depth seventy-six (76) feet ten (10) inches.

Also, all that other lot, piece, or parcel of land, situate, lying, and being on north side of Wentworth street, in the city of Charleston, butting and bounding front thirty-five (35) feet, depth one hundred and four (104) feet; north on land of Paul Remley; east on land of C. W. Seignious; south on Wentworth street; and west on land of M. L. Cohen.

Also, all that other house and lot, situate, lying, and being on north side of Hayne street, numbered 15 of plat City Land Company by R. K. Payne, May, 1850, in the city of Charleston, butting and bounding south on Hayne street; east on party wall separating it from lot No. 16; north on lot No. 17; west on lot No. 14.

Also, all that other lot of land and buildings, situate, lying, and being on the west side of East Bay street, No. 47, in the city of Charleston, butting and bounding east on East Bay street; south on an alley the common property of the owner, of this and lot north side of the alley; west on land, formerly of M. McCall; north on lands formerly of George Reid.

Also, all that other lot, piece, or parcel of land, with buildings thereon, on the east side of Mazyck street, No. 4, situate, lying, and being in the city of Charleston, butting and bounding west by Mazyck street; north by lands of the Misses Cobia; east by land now or formerly of David A. King; and south by lands of Dennis D. Bunch.

Also, all that other lot of land in Mazyckboro', in the city of Charleston, bounded north on another part of wharf lot; east on channel of Cooper River; south on lot No. 15, and part of the canal of 20 feet left for extension of Calhoun street; west on Washington street and lot No. 15, the space of forty feet left in said plat for Marsh street never having been opened by R. F. Smith.

Also, all that other lot, piece, or parcel of land, with the buildings thereon, corner Calhoun and Washington streets, situate, lying, and

15 being in the city of Charleston, butting and bounding west on

Washington street; south on Calhoun street; north and east on water lots late of R. F. Smith.

Also, all that property known as Southern wharf, situate, lying, and being in the city of Charleston, butting and bounding north on old custom-house and Chisolm's wharf; east on the channel of Cooper River; south on lands of Missroon and Benjamin Smith, and west on East Bay street; recorded in book S. No. 14, page 281.

And your orators further shew unto your honors that in and by virtue of the said deeds of mortgage the said real estate therein mentioned and described became bound and liable for the ultimate payment of the said mentioned bonds or obligations; and that the said mortgage deeds enured to the benefit of the holders of the said bonds or obligations, by way of security for the payment of the same; and that the said bonds became a lien upon the said real estate to the extent of the amounts due thereon, with interest as aforesaid.

And your orators further shew unto your honors that the said George A. Trenholm departed this life on the seventh day of November, A. D. 1876, leaving a last will and testament of full force and unrevoked, bearing date the sixteenth day of September, A. D. 1869, whereof he appointed his wife, Anna Helen Trenholm, executrix, and his son, the said William L. Trenholm, executor, which said will has been duly proved in the court of probate for Charleston County, and letters testamentary issued to the said William Trenholm, who has duly qualified and undertaken the burden of the execution of the same. That the said George A. Trenholm, in and by his said last will, gave, devised, and bequeathed all his estate, real and personal, that should remain after payment of all his just debts, to his wife, the said Anna Helen Trenholm, as in and by the said will, reference being thereunto had, will more fully appear.

16 That the said George A. Trenholm left surviving him to take his estate, as his heirs at law, his wife, the said Anna Helen Trenholm, and the following children: Emily St. Pierre Hazzard, the wife of William Miles Hazzard; Alfred Glover Trenholm; Eliza Macbeth, the wife of Alexander Macbeth; Francis H. Trenholm; Emma Josephine Walker, the wife of Legare J. Walker; Celestine Robertson McCullough, the wife of Derrill H. McCullough; and his grand child, Emily St. Pierre Morgan, an infant of tender years, daughter of Emily St. Pierre Morgan, deceased, who was the wife of James M. Morgan.

And your orators further shew unto your honors that the said James T. Welsman departed this life on the seventh day of July, A. D. 1877, leaving a last will and testament of full force, and unrevoked, bearing date the day of August, A. D. 1874, whereof he appointed the said Wilmot G. DeSaussure and Robert N. Gourdin executors, and the said Emma S. Welsman executrix; that the said will has been duly proved in the probate court for Charleston County, and letters testamentary issued to the said executors and executrix therein named as aforesaid, who have all qualified thereon; that in and by his said last will and testament the said James T. Welsman, after sundry specific legacies, gave and bequeathed all the rest and residue of his estate, real and personal, to his daughter, Caroline Napier Welsman, as in and by the said will, reference being thereunto had, will fully appear.

And your orators further shew unto your honors that the said James T.

Welsman left surviving him, as his heir at law, his only living child, the said Caroline Napier Welsman.

And your orators further shew unto your orators that the said Anna Helen Trenholm, under certain proceedings had for the establishment and admeasurement of her dower in the lands, tenements, and hereditaments of her late husband, the said George A. Trenholm, whereof he was seized in his life-time in fee, has by the decree of the probate courts wherein such proceedings were held, become entitled to receive from the estate
17 of the said George A. Trenholm certain sums of money, as in and by the said proceedings, reference being thereunto had, will more fully appear.

And your orators further shew unto your honors that Christopher F. Hampton, administrator of the goods and chattels of Frank Hampton, deceased, did, in the circuit court of the United States for the district of South Carolina, on the day of , A. D. 18 , recover a certain judgment against the firm of John Fraser & Co., of which firm the said George A. Trenholm and James T. Welsman were partners; which said judgment is still unsatisfied, as your orators are informed and believe. (See insertion.)

(15th page, 11th line, after the word "believe" insert the following paragraph:)

"And your orators further shew unto your honors that the said George A. Trenholm, prior to his decease, but subsequent to the execution of the mortgage hereinbefore mentioned and set forth, did, as your orators are informed, execute and deliver to the said James T. Welsman, as executor of his father, the late James Welsman, a second mortgage of his three-fifths interest in the land and premises hereinbefore described as the Pavilion Hotel, and that Maria C. Otis and Emma S. Welsman, who have since the death of the said James T. Welsman, qualified as executrixes under the will of the said James Welsman, claim a lien on the said premises by virtue of such second mortgage subsequent to the lien of the mortgage hereinbefore mentioned and set forth."

And your orators further shew unto your honors that the said Theodore D. Wagner and William L. Trenholm are utterly insolvent and without any means whatever, and unable to meet any of the said bonds or obligations so guaranteed as aforesaid, or to pay the same or any part thereof, and have declined and refused to do so when required, alleging their said inability and insolvency; and your orator, the said J. L. Phipps, has thereupon frequently applied to the said William L. Trenholm, as executor of the said George A. Trenholm, and to the said Wilmot G. DeSaussure, Robert N. Gourdin, and Emma S. Welsman, as executors of the said James T. Welsman, and requested them to pay to your orator the aforesaid principal and interest due on the aforesaid bonds, held by your orator as aforesaid out of the aforesaid estates of their said testators, George A. Trenholm and James T. Welsman; and that divers other such applications have been made to them by the other aforesaid creditors, holders of the said bonds so guaranteed as aforesaid; and that your orators had well hoped that the said executors would have complied with such requests, as in justice and equity they ought to have done. But now, so it is, may it please your honors, the said William L. Trenholm, Theodore D. Wagner, Wilmot G. DeSaussure, Robert N. Gourdin, Emma S. Welsman, Anna Helen Trenholm, Caroline Napier Welsman,

Christopher F. Hampton, and other the defendants hereinbefore mentioned, combining and confederating together, and with divers other persons
18 at present unknown to your orator, whose names when discovered your orators pray they may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orators in the premises, they, the said William L. Trenholm, as executor, and Wilmot G. DeSaussure, Robert N. Gourdin, and Emma S. Welsman, executors as aforesaid, absolutely refused to comply with such requests, and they at times pretend that the said estates of their said testators are unable to meet and satisfy either the said bonds or obligations so guaranteed as aforesaid, or the other liabilities and claims against the said estates; and that the said mortgaged premises cannot be sold now, and the proceeds applied to the payment of the said mentioned bonds and obligations prior to the other liabilities of the said estates; and that the said bonds or obligations are not a lien on the said mortgaged premises by virtue of the said mortgage deeds executed as aforesaid; and that the said defendants, Anna Helen Trenholm and Christopher F. Hampton, administrators of the estate of Frank Hampton, deceased, as aforesaid, have prior unsatisfied claims on the said mentioned real estate that must be paid and satisfied out of the same prior to all other claims or obligations soever. Whereas your orators charge that the said estate of the said George A. Trenholm and James T. Welsman are well able to pay the said bonds so guaranteed as aforesaid, by the sale of the said real estate so mortgaged as aforesaid, and the application of the proceeds of such sales to the payment of the said bonds, which said real estate, as your orators charge, has become bound for the payment of the said bonds so guaranteed as aforesaid, by virtue of the said mortgage deeds; and that the said bonds have thereby become a lien on the said real estate to the extent of the amounts due on the same, with interest as aforesaid; and that the said mortgage deeds have enured to the benefit of your orators, holders of the said bonds so guaranteed as aforesaid; and your orators further charge that the said mortgages interchangeably given by the said George
19 A. Trenholm and the said James T. Welsman, by each to the other, and the property therein mentioned, and which was intended to and should be applied to the payment of the aforesaid bonds of Theodore D. Wagner and William L. Trenholm, guaranteed by the said George A. Trenholm and James T. Welsman, would, if so applied, pay and discharge the said bonds; and your orators further charge that the said mortgaged property in said deeds of mortgage mentioned, is the only property of the estates of the said George A. Trenholm and James T. Welsman that can be applied, and is adequate to the payment and satisfaction of the said bonds, and that there is no other property whatsoever to the said estates belonging that is adequate, and can be so applied to such payment and satisfaction; and your orators further charge that it may be, for aught your orators know to the contrary, that the said Anna Helen Trenholm has a right or claim to be paid the said sum so admeasured to her for dower as aforesaid, out of the said mortgaged real estate, prior to all other claims; but that your orators are not advised whether such claim is tenable in law, and submit the question to this honorable court. And your orators further charge that the said Christopher F. Hampton, administrator as aforesaid, has no claim in or lien on the said mortgaged premises

prior to the lien of the said bonds, as the said William L. Trenholm and other defendants well know; all which actings, doings, pretences, and refusals are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises. In consideration whereof, and forasmuch as your orators can only have adequate relief in the premises in a court of equity, where matters of that nature are properly cognizable and relievable, to the end therefore that the said defendants and their confederates, when discovered, may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, in-
20 formation, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are required to answer, that is to say—

1. Whether the said William L. Trenholm and Theodore D. Wagner did not execute the said bonds or obligations, as hereinbefore set forth?

2. Whether the said George A. Trenholm and James T. Welsman did not endorse and guarantee the said bonds or obligations, as hereinbefore set forth?

3. Whether the said James Robb and Charles T. Lowndes did not assign, transfer, and set over the said bonds, as hereinbefore set forth?

4. Whether the said J. L. Phipps is not the lawful owner and holder of the bonds hereinbefore specified, mentioned, and described as held by him; and whether the amounts for principal and interest hereinbefore mentioned are not justly due on the same?

5. Whether the conditions of the said bonds that are still unpaid and outstanding are not broken, and the same now due and payable; and how many are so still unpaid and outstanding?

6. Whether the said George A. Trenholm and James T. Welsman did not make and execute the agreements and mortgages hereinbefore mentioned; and whether the same are not herein correctly set forth?

7. Whether the said bonds so guaranteed as aforesaid have not become a lien on the said mortgaged premises by virtue of the said mortgages?

8. Whether the said George A. Trenholm has not departed this life, leaving a last will and testament as hereinbefore set forth; and whether letters testamentary thereon have not been issued to the said William L. Trenholm?

9. Whether the said James T. Welsman has not departed this life, leaving a last will and testament as hereinbefore set forth; and whether letters testamentary have not been issued thereon to the said Wilmot G. De-
Saussure, Robert N. Gourdin, and Emma S. Welsman?

21 10. Whether the estates of the said George A. Trenholm and James T. Welsman are sufficient to meet the aforesaid bonds so guaranteed, out of the property of the said estates not included in the real estate as mortgaged as aforesaid; and whether the said real estate is not the only property of the said estates that can be applied to the payment of the said bonds; and what other property belongs to the said estates; and what is the sum total value of the property belonging to the said estates?

11. Whether the said Anna Helen Trenholm has not instituted proceedings for the settlement and admeasurement of her dower as aforesaid, and

in what courts the same have been instituted; and what sums of money, if any, the said Anna Helen Trenholm has become entitled to out of the estate of the said George A. Trenholm, by virtue of the decrees in such proceedings made?

12. Whether the said Christopher F. Hampton has not recovered judgment against the firm of John Fraser & Co.; and when and in what court, and for how much, and what part thereof is still unpaid; and whether the said George A. Trenholm and James T. Welsman were partners in the said firm; and whether their estates are liable for the said judgment?

13. Whether the said William L. Trenholm and Theodore D. Wagner are not wholly insolvent, and unable to meet the said obligations; and whether the estates of the said George A. Trenholm and Jamas T. Welsman are not liable for the same?

And that the said defendants may answer the premises; and that an account may be taken of the principal sums and interest remaining due unto your orators repectively as holders of the bonds or obligations so guaranteed as aforesaid, on the security of the said mortgaged premises; and that the defendants, the said William L. Trenholm, as executor of the said George A. Trenholm, and Wilmot G. DeSaussure and Robert N. Gourdin and Emma S. Welsman, as executors of the said James T. Welsman,
may be decreed to pay unto your orators, respectively, what shall
22 appear to be justly due and owing to them on the taking of the aforesaid account, together with the costs of this suit; and that, in default of such payment, the said William L. Trenholm, Wilmot G. DeSaussure, Robert N. Gourdin, and Emma S. Welsman may be ordered to sell the real estate of their respective testators, at such times and on such terms, and in such manner, as to your honors shall seem meet and proper; and that the proceeds of sale, after payment of all liens, if any thereon prior to the lien of the said bonds, be applied to the payment of the amounts so found due to your orators on the taking of the said account; and that the defendants, and all persons claiming under them, or either of them, be absolutely and forever debarred and foreclosed of and from all or any right, title, interest, or equity of redemption of, in, to, or concerning the said mortgaged premises, and every and any part thereof; and that your orators respectively have leave to enter up judgment against the said William L. Trenholm, as executor of the said George A. Trenholm, and the said Wilmot G. DeSaussure, Robert N. Gourdin, and Emma S. Welsman, as executors of the said James T. Welsman, for any deficiency that may remain due to them, and each of them respectively, on the said account after the application of the said proceeds of sale to the same; and that your orators may have such other and further relief in the premises as the nature of the circumstances of this case may require and to your honors shall seem meet.

May it please your honors to grant unto your orators a writ of subpœna, to be directed to the said Theodore D. Wagner, William L. Trenholm, Wilmot G. DeSaussure, Robert N. Gourdin, Emma S. Welsman *(see below), Anna Helen Trenholm, Emily St. Pierre Hazzard and William Miles Hazzard, her husband, Alfred Glover Trenholm, Eliza Macbeth and Alexander Macbeth, her husband, Francis H. Trenholm, Emma Josephine Walker and Legare J. Walker, her husband, Celestine Robert-

*20th page, 31st line, after the words "Emma S. Welsman," insert "Maria C. Otis."

son McCullough and Derrill H. McCullough, her husband, Emily St. Pierre Morgan, an infant of tender years, Caroline Napier Wels-
23 man, and Christopher F. Hampton, administrator of the estate of Frank Hampton, deceased, commanding them, at a certain day and under a certain pain therein to be limited, personally to be and appear before your honors, in this honorable court, and then and there full, true, direct, and perfect answers make to all and singular the premises; and further, to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet; and your orators shall ever pray, &c., &c.

MITCHELL & SMITH,
Complainants' Solicitors.

NOTE.—The defendants are each required to answer all the interrogatories above set forth, numbered from 1 to 13, both inclusive.

MITCHELL & SMITH,
Complainants' Solicitors.

And on the 1st day of April, A. D. 1878, came into court the complainant, by his solicitors, Mitchell & Smith, and obtained the following order pro confesso, which order is in the words and tenor following:

No. 3.

Order pro confesso.

UNITED STATES OF AMERICA,
District of South Carolina:

In the circuit court. Rules day.

It appearing to my satisfaction that the defendants Theodore D. Wagner, Emily St. Pierre Hazzard, Wm. Miles Hazzard, Alfred
24 Glover Trenholm, Eliza Macbeth, and Alexander Macbeth, Francis H. Trenholm, Emma Josephine Walker, Legare J. Walker, Celestine Robertson McCullough, and Derrill H. McCullough have been duly served with subpœna in the within case and have failed to appear, plead, answer, or demur to the same; now, on motion of Mitchell & Smith, complainants' solicitors, it is ordered that an order pro confesso be entered against them.

Rules day, April 1, 1878.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C. & Special Master.

And on the 8th day of April, A. D. 1878, the defendant Christopher F. Hampton, adm'r, by his solicitors, Simonton & Barker, and filed the following answer, which answer is in the words and tenor following:

No. 4.

Answer.

United States of America, fourth circuit, district of South Carolina. In equity.

J. L. PHIPPS AND OTHERS *vs.* THEODORE D. WAGNER, WILLIAM L. TRENHOLM, & others. } Answer of Christopher F. Hampton, adm'r.

25 The separate answer of Christopher F. Hampton, as administrator of estate of Frank Hampton, deceased, to the bill of complaint of J. L. Phipps, of New York, suing on behalf of himself and all other the creditors as holders of certain obligations of George A. Trenholm and James T. Welsman.

1. This defendant, saving and reserving to himself all rights of exception to the many errors in the complainant's said bill contained, for answer thereto and to so much thereof as it is proper that he should make answer unto, answering, says:

That he denies that the court hath, by means of said bill, any jurisdiction, at the instance of the complainant, to require this defendant to make answer to said bill of complaint, and protesting against the exercise of the jurisdiction so invoked by the complainant, says: That he believes it to be true that heretofore Theodore D. Wagner and William L. Tren-

26 holm, jointly and severally, made and executed their certain bonds as set forth in the bill, and that George A. Trenholm and James T. Welsman did, in and by their obligations in writing, duly endorsed under their hands and seals, upon all and each of said bonds respectively, guarantee the same, and that by endorsement, James Robb and Charles T. Loundes, trustees, assigned, set over, and transferred the same, and directed payment thereof to be made to the holder thereof.

This defendant has no knowledge nor information sufficient to enable him to form a belief as to whether the plaintiff became and is the lawful owner and holder of the same, as stated in the bill, nor whether interest on the said bonds so held has been paid or not paid. Defendant admits that bonds, such as are described in the complaint, have become due in the hands of the holders of them, but whether to the complainant as such holder defendant has no knowledge or information.

27. Defendant knows nothing, of his own knowledge, of the agreement mentioned between George A. Trenholm and James T. Welsman, the guarantors on said bonds, dated 3rd May, 1869, nor of anything alleged to have been done under it.

This defendant does not admit that the real estate mentioned in the mortgages, which are described in the bill, between George A. Trenholm and James T. Welsman became bound for the payment of said bonds or obligations, otherwise than subject to the lien of the judgments which this defendant recovered in this court, as mentioned in the bill, and as so recognized from 1869 to the date of their death, respectively, by the said George A. Trenholm & James T. Welsman.

This defendant admits the death of George A. Trenholm, but as to his

will defendant knows nothing, and of his surviving heirs at law only by reputation. He admits the death of James T. Welsman, but of his will defendant knows nothing, and of his heir at law only by reputation.

28 Defendant knows nothing and has had no notice of the proceedings said to have been had for the establishment and admeasurement of the dower of Anna Helen Trenholm, the widow of George A. Trenholm, and denies that by such proceedings she has become entitled, otherwise than as subject to the judgments held by this defendant.

This defendant admits that, as administrator of the estate and effects of Frank Hampton, deceased, he recovered a judgment in this court on the nineteenth day of June, A. D. 1869, against George A. Trenholm, James T. Welsman, Theodore D. Wagner, and Charles K. Prioleau, as members of the firm of John Fraser and Company, upon the guaranty of said firm upon the bond of George A. Trenholm to this defendant, and dated the day of , A. D. 1863; says that he recovered a judgment of same date against the said George A. Trenholm, individually, as obligor, neither of which judgments have been satisfied.

29 This defendant knows nothing of the mortgage from George A. Trenholm, prior to his decease, to James T. Welsman, as executor of his father, the late James Welsman.

This defendant knows nothing of the alleged insolvency of Theodore D. Wagner, and of William L. Trenholm, or of the refusal of the executor of George A. Trenholm, and of the executors of James T. Welsman, to pay said bonds to the complainant; and this defendant denies all confederacy on his part with the said William L. Trenholm, Theodore D. Wagner, and others, as charged in the bill, and the defendant insists that the judgments above held by him, as administrator, are and have always been acknowledged by the said George A. Trenholm and James T. Welsman, during their lives, and by their representatives, and others, to be prior liens upon the property alleged to be mortgaged as stated in the complaint.

This defendant, having fully answered the matters stated in the bill of complaint, prays to be hence dismissed with his reasonable costs

30 and charges most wrongfully by him sustained.

SIMONTON & BARKER.

THE STATE OF SOUTH CAROLINA,
Charleston County:

Theodore G. Barker, being duly sworn, says that he is agent and attorney for Christopher F. Hampton, administrator of the estate of Frank Hampton, deceased, one of the defendants in this action, that the foregoing answer is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason why the verification is not made by said defendant is that all the material allegations of said answer are within the personal knowledge of this deponent.

THEODORE G. BARKER.

Sworn to before me this 1st day April, 1878.

D. B. GILLILAND,
Not'ry Pub.

31 And on the 16th day of January, A. D. 1878, came into court the defendants Maria C. Otis and Emma S. Welsman, executrixes of James Welsman, deceased, by their solicitors, DeSaussure & Son, and filed the following answer, which answer is in the words and tenor following:

No. 5.

Answer.

UNITED STATES OF AMERICA:

Fourth circuit, South Carolina district. In equity.

The joint and several answer of Maria C. Otis and Emma S. Welsman, executrixes of the last will and testament of James Welsman, late of Charleston, a citizen of South Carolina, deceased, who are impleaded together with Theodore D. Wagner, William L. Trenholm in his own right and as surviving copartner of the firm of George A. Trenholm & Son and as executor of George A. Trenholm, deceased; Wilmot G. De Saussure, Robert N. Gourdin, and Emma S. Welsman, executors and executrix of James T. Welsman; Anna Helen Trenholm, widow
32 of the said George A. Trenholm; Emily St. Pierre Hazzard and William Miles Hazzard, her husband; Alfred Glover Trenholm, Eliza Macbeth and Alexander Macbeth, her husband; Francis H. Trenholm, Emma Josephine Walker and Legare J. Walker, her husband; Celestine Robertson McCullough and Derrill H. McCullough, her husband; Emily St. Pierre Morgan, an infant of tender years; Caroline Napier Welsman, and Christopher F. Hampton, administrator of the estate of Frank Hampton, deceased, to the bill of complaint of J. L. Phipps, a citizen of New York, on behalf of himself and others, the creditors of George A. Trenholm and James T. Welsman, deceased.

These defendants, saving and reserving to themselves now and at all times hereafter all and all manner of advantage and benefit of exception to the manifold errors, uncertainties, and insufficiencies in the complainants' said bill of complaint contained, for answer thereto, or unto so much thereof as these defendants are advised is material or necessary for them to
33 make answer unto, answering, say:

I. That they have been informed and believe, and therefore admit it to be true, that Theodore D. Wagner and William L. Trenholm, as copartners of the firm of John Fraser & Co., being in embarrassed circumstances, did, some time in the year 1867, enter into an agreement with the creditors of said firm, whereby a very large amount of bonds, exceeding two millions of dollars, were to be executed by them; such bonds to be of two classes, generally designated as A bonds and B bonds, both classes of which were to be in series, and that upon the B bonds, amounting to the sum of seven hundred and ten thousand dollars, they agreed to obtain personal guarantees which should be satisfactory to the trustees, James Robb and Charles T. Lowndes, but for greater certainty in this particular, these defendants pray that the plaintiffs may be required to produce the agreements

under which the bonds of both classes and series were to be issued, so that the conditions thereof may be fully examined by this hon'ble court,
34 and it be ascertained what is the true and legal status of any or all the bonds which may have been issued thereunder, and also that the trustees under the said agreement may be made parties to these proceedings, and required to discover what number and amount of bonds of each class and series were issued and delivered to them, and how and to what creditors of the said Theodore D. Wagner and William L. Trenholm, as such copartners, and in what amounts such bonds were paid out by them, so that it may be examined into by this hon'ble court, and it be ascertained whether the bonds which may have been executed were issued by the trustees in compliance with the terms and under the powers given to them as trustees.

II. That they have been informed and believe, and therefore admit it to be true, that upon the bonds designated as B bonds, amounting to seven hundred and ten thousand dollars, which were to be executed as aforesaid, and upon which personal guaranties were to be obtained, for the
35 payment thereof to the creditors of the said Theodore D. Wagner and William L. Trenholm, as such copartners, under the terms of the said agreement, the said George A. Trenholm and James T. Welsman, both now deceased, did, in their life-times, under their hands and seals, endorse their joint and several guaranties, and did become liable, jointly and severally, for the payment of the principal and interest of such of them as should be properly issued under the terms of the said agreement.

III. That they are uninformed and ignorant, and can neither admit nor deny the plaintiff's allegation in regard to the assignment and transfer to him of any of the said bonds, and submit to the judgment of this hon'ble court that such allegation is a fact which the plaintiff should be required to establish by sufficient legal evidence, and whether the same, if any, were so assigned and transferred to him in pursuance of the terms of said agreement.

36 IV. That they are uninformed and ignorant, and can neither admit nor deny the plaintiff's allegations in regard to the non-payment of interest upon such bonds as he claims to hold by assignment and transfer as aforesaid, and submit to the judgment of this hon'ble court that such allegation is a fact which the plaintiff should be required to establish by sufficient legal evidence.

V. That they are uninformed and ignorant what number and amount of such bonds were properly issued and paid out in pursuance of the terms of the said agreement, or what number and amount are now outstanding, and they pray that an account may be strictly taken under the directions of this hon'ble court, so that the true status of all or any such may be examined into.

VI. And these defendants, further answering, say that they are informed and believe that some time on or about the third day of May, 1869, an agreement was made and entered into between the said George A.
37 Trenholm and James T. Welsman, wherein it was stated that as between themselves, the said George A. Trenholm and James T. Welsman, the joint and several liability as guarantors on such bonds as were endorsed by them under the aforesaid agreement with the creditors, and which should be issued in pursuance of the terms thereof, was limited,

on the part of the said George A. Trenholm as against the said James T. Welsman, to the sum of four hundred thousand dollars, and on the part of the said James T. Welsman as against the said George A. Trenholm, to the sum of three hundred and ten thousand dollars, and they, respectively, as between themselves, covenanted to hold each the other indemnified for any and all payments over and above such respective sums and amounts, and also respectively covenanted that each would execute to the other a mortgage of certain real estates respectively belonging to each of them individually, as a security for the indemnification covenanted under the
38 said agreement; but these defendants deny that such agreement and mutual covenants had any reference to creditors holding the said bonds, or any of them, or was intended in any manner or way as a security to or for the said creditors, or any of them, or can in any way be so construed or held.

And insists that the same was entirely a private agreement between the said George A. Trenholm and the said James T. Welsman, for their respective protections against the payment of a larger sum or amount, upon a debt for which each was severally liable, than was by the said agreement limited as their respective liabilities as between themselves, the said George A. Trenholm and James T. Welsman. And these defendants pray that the plaintiff having set forth the said agreement, may be required to produce and prove the same, so that it may be submitted to the examination of this hon'ble court, and its true interest, meaning, and purpose may be construed according to the terms thereof.

39 VII. That they are informed and believe that in pursuance of the said agreement of the third day of May, 1869, the said George A. Trenholm, to indemnify and secure the said James T. Welsman from the payment of a larger sum, amount, or proportion of the said bonds so as aforesaid jointly and severally guaranteed, than the sum, amount, or proportion fixed by the said agreement as the share or proportion of him, the said James T. Welsman, did execute and deliver to the said James T. Welsman a deed of mortgage of certain real estate as set forth in the bill of complaint. And for like purpose the said James T. Welsman did execute and deliver to the said George A. Trenholm a deed of mortgage of certain real estate as set forth in the bill of complaint; but these defendants deny that such mortgages had any reference to creditors holding the said bonds or any of them, or were intended in any manner or way
40 as a security to or for the said creditors or any of them, or can in any way be so construed or held. And they insist that the said mortgages respectively were entirely given and received, and held by the said George A. Trenholm and James T. Welsman as securities to indemnify each the other, and as between themselves as a protection against the payment of a larger sum or amount upon a debt for which each was severally liable than was by the said agreement limited as their respective liabilities as between themselves, the said George A. Trenholm and James T. Welsman. And these defendants pray that the plaintiff having set forth the said deeds of mortgage may be required to produce and prove the same, so that the same may be submitted to the examination of this hon'ble court, and the true intent, meaning, and purpose of the same may be construed according to the terms thereof.

VIII. And these defendants, further answering, say that they
41 have been informed and believe, and they so allege and charge, and are ready to prove, as occasion may require, that at or about the time of the execution of the said B bonds, and as a part of the agreement under which the same were executed, there was delivered to the said George A. Trenholm a large amount of bonds, stocks, choses in action, and securities of the value of about seven thousand dollars, to be by him managed, sold, and administered, and the proceeds applied to the taking up and paying off of the said B bonds; and they, further answering, say that they have been informed and believe, and so allege and charge, that from the sales and disposition of the said bonds, stocks, choses in action, and securities, a very large amount of the said B bonds have been taken up, paid off, and discharged by the said George A. Trenholm for the mutual and common benefit and relief of himself and of the said James T. Welsman; and they insist that until an account is rendered
42 by their codefendant, William L. Trenholm, as executor of George A. Trenholm, of the sales and disposition of the said bonds, stocks, choses in action, and securities, and of what B bonds have been taken up, paid off, and discharged by the proceeds of the same. It is impracticable to ascertain whether either of them, the said George A. Trenholm and James T. Welsman, has overpaid the proportions respectively agreed upon between them, and whether the said deeds of mortgage have become operative for the intents and purposes for which they were executed and delivered; and also to ascertain what number and amounts of the said B bonds are still outstanding and unpaid; and these defendants pray this hon'ble court to order and direct such account to be rendered and taken as a preliminary necessary in the adjudication of the matters contained in the bill of complaint.

IX. And these defendants, further answering, say that they are
43 informed and believe, and so allege and charge, that of the said B, bonds so as aforesaid taken up, paid off, and discharged by the said George A. Trenholm, a large number and of considerable amounts have been, by him or his agents, or by his authority, reissued, and they insist that any and all such reissued B bonds stand upon a different legal footing from the B bonds originally issued and outstanding, and are beyond the protection of the said mortgages of indemnity; and they pray that this hon'ble court will order and direct an account to be rendered by the defendant William L. Trenholm, as executor of George A. Trenholm, and to be taken under the direction of this hon'ble court as a preliminary necessary in the adjudication of the matters contained in the bill of complaint; and they also pray that the plaintiff may be required to prove whether the B bonds alleged in the bill of complaint to be held by him are originally issued or reissued bonds; and they pray that if
44 any are reissued bonds, whatever advantage or benefit may arise from that fact may be given to these defendants, if necessary.

X. And these defendants, further answering, say that they deny "that in and by virtue of the said deeds of mortgage the said real estate therein mentioned and described became bound and liable for the ultimate payment of the said mentioned bonds or obligations, and that the said mortgage deeds inured to the benefit of the holders of the said bonds or obligations by way of security for the payment of the same, and that the said bonds became a lien upon the said real estate to the extent of the amounts

due thereon, with interest as aforesaid; on the contrary, they allege and insist that the said deeds of mortgage were only intended to be, and are only, securities by way of indemnity between the estates of the said George A. Trenholm and James T. Welsman, and inoperative until the contingencies therein provided for should occur, and they further allege and
45 insist that until the accounts called for and prayed by these defendants, in paragraphs VIII and IX of this answer, are rendered and taken, it is impracticable to ascertain whether the said deeds of mortgage are operative as between those two estates, and no decree touching the same can be rendered.

XI. They admit it to be true, as alleged in the bill of complaint, that the said George A. Trenholm departed this life on the ninth day of December, 1876; and they are informed and believe that he left of force an unrevoked will, which has been admitted to probate, and upon which the defendant William L. Trenholm has qualified as executor, and they are informed and believe that its terms are as stated in the bill of complaint. But they submit to the judgment of this hon'ble court that inasmuch as the plaintiff, in his bill of complaint, has alleged it as a fact, that he be required to establish the same by sufficient legal evidence.

XII. That they are informed and believe that the said George
46 A. Trenholm left surviving him a widow, Anna Helen Trenholm, and the children and grandchild mentioned in the bill of complaint. But whether such widow, children, and grandchild are his heirs at law they submit is a matter to be decided by this hon'ble court.

XIII. They admit it to be true that the said James T. Welsman departed this life on the seventh day of July, 1877, leaving of force an unrevoked will which has been admitted to probate, and Wilmot G. Desaussure, Robert N. Gourdin, and Emma S. Welsman have qualified as executors and executrix thereupon, and the provisions of which are substantially set forth in the bill of complaint.

XIV. That they admit it to be true that the said James T. Welsman left surviving him one only child, their codefendant Caroline Napier Welsman. But whether such only child is his heir at law they submit is a matter to be decided by this hon'ble court.

XV. That they have been informed that certain proceedings were
47 instituted by the said Anna Helen Trenholm; but they are ignorant of the purpose of such proceedings, and submit to the judgment of this hon'ble court that inasmuch as the plaintiff has alleged the same in his bill of complaint, he should be required to establish the same by sufficient legal proof.

XVI. That they have been informed and believe that a judgment was obtained by Christopher F. Hampton, administrator of the goods and chattels of Frank Hampton, deceased, as stated in the bill of complaint, but of the particulars thereof, and whether the same has been paid or not, and if not paid, how much remains unpaid, these defendants are ignorant, and pray that their codefendant Christopher F. Hampton, administrator as aforesaid, may be required to answer what payments, if any, have been made thereupon, by whom made, and what amount, if any, remains unpaid thereupon.

XVII. And these defendants, further answering, say that the said George A. Trenholm, in his life-time, being indebted in a large sum

48 of money to the late James Welsman, the testator of these defendants, and the said James Welsman having departed this life leaving of force an unrevoked will, of which the late James T. Welsman had been appointed executor and these defendants had been appointed executrixes, which will had been admitted to probate and James T. Welsman alone qualified as executor thereupon and assumed the burthen of administration; the said James T. Welsman, in the course of such administration, arranged the said debt with the said George A. Trenholm, and the *and the* said George A. Trenholm has an acknowledgment and liquidation of such debt, on the thirteenth day of June, 1871, executed and delivered to the said James T. Welsman, executor of James Welsman, the bond or obligation of him, the said George A. Trenholm, conditioned for the payment of the sum of sixteen thousand dollars, with interest thereon from the first day of January, 1871, at the rate of seven per cent. per annum, payable semi-annually until the whole principal
49 and interest should be fully paid, in five equal successive annual instalments, the first whereof to be paid on the first day of January, 1873; and to secure the said bond or obligation on the same day executed and delivered to the said James T. Welsman, executor of James Welsman, a deed of mort of his three-fifths interest in the land and premises described in the bill of complaint as the Pavilion Hotel, which mortgage was recorded in the office of the register of mesne conveyances for Charleston County, on the thirteenth day of June, 1871, in book , No. , page , and the originals of which said bond or obligation and deed of mortgage are now in the hands of these defendants' solicitors, ready to be produced as occasion may require.

XVII½. And these defendants, further answering, say that a large amount of interest is in arrear and unpaid upon the said bond or obligation; that four instalments of the principal are past due and unpaid,
50 and that the fifth and last instalment will become due and payable on the first day of January, 1878.

XVIII. And these defendants, further answering, say that after the death of the said James T. Welsman, as stated in paragraph XIII of this answer, these defendants, who had been named as executrixes in the will of the said James Welsman, qualified thereupon as such, and letters testamentary were granted to them by the judge of probate for Charleston County, in due form, and of which they now make profert.

XIX. And these defendants, further answering, say that they are advised, and they so insist, that at the time at which the said George A. Trenholm executed the aforesaid mortgage to the said James T. Welsman, executor of James Welsman as aforesaid, the mortgage of indemnity previously executed by the said George A. Trenholm to the said James T. Welsman was inoperative, the said James T. Welsman not having then paid a larger share or proportion of the said B bonds than was his share or pro-
51 portion under the agreement between the said George A. Trenholm and the said James T. Welsman. And they are further advised and they so insist, that at no time since the execution of the said mortgage of indemnity has the said James T. Welsman paid a larger share or proportion of the said B bonds than was his share or proportion under the agreement between the said George A. Trenholm and the said James T. Welsman, and that the said mortgage of indemnity never

has been and is not now operative. And they pray that an account may be taken of the amount of such B bonds paid by the said James T. Welsman, and if it should be found that he has not paid a larger share or proportion than his share or proportion under the agreement aforesaid, that the said mortgage of indemnity may be adjudged and decreed by this hon'ble court as inoperative and void as against the mortgage held by these defendants as executrixes of James Welsman, as aforesaid.

XX. And these defendants, further answering, say that they submit it to the judgment of this hon'ble court that the said James T.
52 Welsman, by taking to himself as executor of James Welsman the deed of mortgage as aforesaid, under all the circumstances aforesaid, should be considered as having waived and postponed any and all rights, if any there were, which he may have had under the aforesaid mortgage of indemnity held by him, and they pray that this hon'ble court will so adjudge and decree, and will order the mortgage so held by them as executrixes as aforesaid to be set up and established as the prior lien and mortgage upon the said three-fifths interest in the premises described as the Pavilion Hotel.

XXI. That they are ignorant of the pecuniary means and condition of their codefendants Theodore D. Wagner and William L. Trenholm, and submit to the judgment of this hon'ble court that inasmuch as the plaintiff in his bill of complaint alleges it is a fact he should establish the same by sufficient legal proof.

XXII. And these defendants, further answering, say that in this
53 their answer they distinctly answer each of the thirteen interrogatories required to be answered, to the best of their knowledge, information, and belief, as follows, to wit:

1. The first interrogatory they answer by paragraph I of this answer.

2. The second interrogatory they answer by paragraph II of this answer.

3. The third interrogatory they answer by paragraph III of this answer.

4. The fourth interrogatory they answer by paragraph III, IV, and V of this answer.

5. The fifth interrogatory they answer by paragraph V of this answer.

6. The sixth interrogatory they answer by paragraphs VI and VII of this answer.

7. The seventh interrogatory they answer by paragraphs VIII, IX, and X of this answer, and by denying that the said bonds so guaranteed as aforesaid have become a lien upon the said mortgaged premises by virtue of the said mortgages; and also by paragraphs XVII, XIX, and XX of this answer, claiming that these defendants hold the only operative
54 lien or mortgage upon the three-fifths interest in the property described as the Pavilion Hotel.

8. The eighth interrogatory they answer by paragraph XI of this answer.

9. The ninth interrogatory they answer by paragraph XIII of this answer.

10. The tenth interrogatory they now answer by saying that they are uninformed and ignorant whether the estates of George A. Trenholm and James T. Welsman are sufficient to meet the aforesaid bonds so guaran-

teed out of the property of the said estates not included in the real estates as mortgaged as aforesaid, or whether the said real estate is not the only property of the said estates that can be applied to the payment of the said bonds; and also what other property belongs to the said estates, or what is the sum total value of the property belonging to the said estates.

11. The eleventh interrogatory they answer by paragraph XV of this answer.

12. The twelfth interrogatory they answer by paragraph XVI
55 of this answer.

13. The thirteenth interrogatory they answer by paragraph XXI of this answer.

XXIII. And these defendants, further answering say that, denying all and all manner of combination and confederacy, as in the bill of complaint contained, without that there is any other matter, fact, or thing in the complainant's bill of complaint contained material or necessary for these defendants to make answer unto, not herein or hereby well and sufficiently answered, avoided, traversed or denied, true to the knowledge or belief of these defendants, pray to be hence dismissed with their reasonable costs and charges in this behalf wrongfully sustained.

DESAUSSURE & SON,
Def'ts' Att'ys.

Maria C. Otis, executrix of James Welsman, one of the above-named defendants, being duly sworn, makes oath that she has read the foregoing answer, and the same is true to her own knowledge, except
56 as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

MARIA C. OTIS,
Executrix of James Welsman.

Sworn to before me this 29th day of December, 1877.

SAM'L C. BLACK, [L. S.]
Notary Public.

And on the 31st day of December, A. D. 1877, came into court the defendants Wilmot G. DeSaussure, Robert N. Gourdin, and Emma S. Welsman, executors and executrix of James T. Welsman, by their solicitors, Rutledge & Young & H. A. DeSaussure, and filed the following answer; which answer is in the words and tenor following:

No. 6.

Answer.

In the circuit court. In equity.

UNITED STATES OF AMERICA,
Fourth Circuit, South Carolina District:

The joint and several answer of Wilmot D. DeSaussure, Robert N. Gourdin, executors, and Emma S. Welsman, executrix of the last will and
57 testament of James T. Welsman, late of Charleston, merchant,

deceased, three of the defendants to the bill of complaint of J. L. Phipps, alleging himself to be a citizen of the State of New York.

These defendants, reserving to themselves all benefit of exception to the said bill of complaint, for answer thereto, nevertheless, answering say:

1. That their testator, the said James T. Welsman, died on the 7th day of July, A. D. 1877, and that by the statute of South Carolina in such case made and provided, no suit can be brought against them in regard to the estate of their said testator till nine months after such his death, and no judgment can be had against them as executors of his will till one year after such death. They pray that they may have the benefit of such statute, as if the same were here specially pleaded, and that this suit be stayed till the lapse of such periods respectively.

2. Protesting that they are not bound at this time to answer the complainant's bill of complaint, and not waiving or relinquishing
58 the exemption secured to them by the statute aforesaid; yet, nevertheless, further answering, these defendants say that there is now, and was at the date of the filing of the complainant's bill of complaint, an action pending in the circuit court for Charleston County, and State of South Carolina, substantially identical as to the parties thereto, and in all other respects identical with the said bill of complaint, the only difference being that in the former action the said William L. Trenholm, executor, is plaintiff, & in the latter defendant. In the former the representatives of the holders of the bonds alleged by the said J. L. Phipps to be held by him, viz, George W. Williams and Anna W. Alston are defendants, and in this present suit the said J. L. Phipps, claiming to represent such bonds, is complainant, that the said complaint was filed by the said Wm. L. Trenholm on the day of , A. D. 1877, & served on these defendants on the day of the same month; that on the
59 21st day of August, 1877, these defendants asked of the said Wm. L. Trenholm a full account of all transactions between their testator and the said George A. Trenholm, in regard to the bonds of the said Wm. L. Trenholm and Theo. D. Wagner, guaranteed by the said James T. Welsman and George A. Trenholm, which account was not given as asked. On the day of following, while these defendants were withholding their answer because of a notice from the said plaintiff's solicitor that he would amend his bill, the said complainant filed this his bill of complaint and erroneously states, as will be shown more fully hereafter, that there was an agreement between the said James T. Welsman & George A. Trenholm, to secure to the bondholders the payment of said bonds, which these defendants deny.

These defendants submit that all proceedings in this the complainant's said bill of complaint be stayed till said action pending in said State court be decided.

60 3. Protesting, therefore, that they are not bound to further answer the said bill of complaint till the said action in the State court is decided, & waiving no right thereby, still these defendants, further answering, say that they believe it to be true that their codefendants Theodore D. Wagner & Wm. L. Trenholm, partners in the late firm of John Fraser & Co., did, at the time of the failure of the said firm, some time in 1867 or 1868, make and deliver to the trustees named in the said bill of complaint their certain bonds conditioned for the payment of seven hun-

dred and ten thousand (710,000) dollars, and known as the B bonds, and certain other bonds conditioned for the payment of one hundred & thirty-five thousand (135,000) dollars, about, and known as the C bonds.

That said bonds were issued, as aforesaid, as part of the compromise made by the said firm with their creditors; that George A. Trenholm and James T. Welsman, now both dead, who were formerly, but not
61 at the time of its failure, members of the said firm, did guarantee the payment of both classes of the said bonds.

4. Whether or not the complainant is a citizen of the State of New York, and whether or not he is the bona fide holder & owner of the bonds mentioned in the complaint, or of any one or more of them, these defendants have not sufficient information to form a belief, and pray strict proof thereof.

5. That in the said action recently filed in the State circuit court by William L. Trenholm, the executor and late partner of the said George A. Trenholm, the proportions of the liability of the said George A. Trenholm and James T. Welsman, as between themselves, for the obligations incurred by them for the debts of the said firm of John Fraser & Co., are given as, respectively, four-sevenths (4/7) and three-sevenths (3/7), instead of forty seventy-one parts and thirty-one seventy-one parts thereof, as
62 stated by the complainants. Defendants say that the means of information of the said William L. Trenholm in this respect be necessarily greater than that of the complainant, they accept his statement as correct, in case there be any liability on the part of the estate of their testator, and pray strict proof of that made by the complainant.

6. Further answering, these defendants say, true it is that the said George A. Trenholm and James T. Welsman, to save each other harmless on account of any claim by reason of the guarantees, endorsements, and obligations, beyond the proportions agreed to be assumed by each, did mortgage certain property each to the other, but they deny that such mortgages were given "to secure to the bondholders the payment of the said bonds," as stated in the said bill of complaint.

7. Defendants are advised that, in certain contingencies not necessary to be mentioned here, the said bondholders may, perhaps, have an
63 equity to be subrogated to the rights of the said mortgagees respectively. But, denying such right of subrogation, these defendants say that at the utmost the creditors have only an equity so to be, and cannot claim that the real estate interchangeably mortgaged as aforesaid shall be sold till all the accounts and all the equities between the estates of the said George A. Trenholm and James T. Welsman are fully settled and adjusted. That, in fact, the said bondholders can claim nothing from the estate of the said George A. Trenholm by virtue of the said mortgage till they show that the estate of the said James T. Welsman is entitled to make such claim, & then only to the amount, and no more, that the said estate could make such claim, and vice versa.

8. Further answering the said bill of complaint, these defendants admit the statements concerning the death of the said George A. Trenholm, his will, and the state of his family, and concerning the death of the
64 said James T. Welsman, his will, & the condition of his family. They know nothing except from hearsay of the proceedings said to have been instituted by Mrs. Anna Helen Trenholm to have dower ad-

measured to her out of the property mortgaged as aforesaid by her late husband, George A. Trenholm, to the said James T. Welsman, to secure him as aforesaid, & pray strict proof thereof. They cannot admit that the said Theodore D. Wagner and William L. Trenholm, the principal on the bonds guaranteed as aforesaid by their testator and the said George A. Trenholm are "utterly insolvent and unable to meet any of said bonds."

On the contrary, so far as they know and believe, they are both engaged in mercantile business—the said Wm. L. Trenholm, especially, in business begun on a capital of some two hundred thousand (200,000) dollars and reported to be large and lucrative. They are constrained therefore to deny this allegation and to demand strict proof thereof.

65 9. Further answering, these defendants deny that as between themselves the said George A. Trenholm and James T. Welsman, in their life-time, and now their estates, are primarily responsible for the bonds guaranteed by them as aforesaid; on the contrary, they say that a large amount of securities, of the value of six hundred and thirty thousand (630,000) dollars, and, perhaps, nine hundred thousand (900,000) dollars, were put into the hands & under the control of the said George A. Trenholm to secure both himself and the said James T. Welsman & their estates respectively from loss in the premises, and it was only after the exhaustion of these securities that there was, as between themselves, to be any liability upon them, and then in the proportion stated by the said Wm. L. Trenholm in his complaint.

66 10. These defendants are informed and believes that the said George A. Trenholm, in his life-time called in a large amount of these securities, and sold others, thus obtaining a large sum of money, and by lending out such moneys, at the large rates of interest which prevailed from time to time, made large gain and profit thereout; that, so far as these defendants can learn, no full and consecutive account of these collaterals was rendered by the said George A. Trenholm, in his life-time, nor has the same been rendered by his executor since his death, but only fragmentary accounts, which, so far as these defendants can learn, were unintelligible to the said James T. Welsman, and are so to these defendants, and do not show what moneys came into the hands of the said George A. Trenholm, from the calling in and from the sale of said securities and collaterals, and from the lending of such moneys out.

67 11. These defendants further say that at various times since the guaranteeing of said bonds, their testator paid to the said George A. Trenholm, at his request, moneys amounting to eighty-nine thousand (89,000) dollars to be applied to the extinguishment of the obligations undertaken by them on account of the said Theodore D. Wagner and William L. Trenholm & the said firm of John Fraser & Co.

12. That from the moneys derived from the said securities and from the said James T. Welsman in his life-time, the said George A. Trenholm in his life-time, and his executor since his death, as these defendants are informed and believe, bought a large amount of the said B and C bonds at a large discount; and also it is said that the said George A. Trenholm, directly or indirectly, through his late firm, bought a large amount of the said bonds with money of his own. These defendants submit that their testator's estate is chargeable only with the pro rata amount actually paid for the said bonds, & no more.

13. And further answering, these defendants say that they are
68 informed and believe that the said George A. Trenholm has issued or caused to be reissued a large amount of the said bonds so bought by him, & which should have been cancelled. Defendants submit that the estate of their testator is not responsible for such reissued (if any) bonds, and furthermore that pro tanto the mortgage on the real estate of the said George A. Trenholm & James T. Welsman is satisfied.

14. These defendants submit that it is impossible for them or for the court to proceed in this cause till the executor of the said George A. Trenholm has submitted to them or to the court a full account of the said collaterals showing:

I. Of what the said collaterals and each of them consisted, and the value of each of them when put into the hands of Mr. Trenholm or his agent.

II. When each of such collaterals was called in or sold, and what amount was received from such as were called in; and what price those
69 sold brought; whether sold at private or public sale? If at private sale, by whom sold and by whom bought; if at public sale, by what auctioneer sold, and to whom knocked down?

III. How were the proceeds of such sale, and of each of them, applied & used? If loaned out at interest, at what rate, and to whom, and with what result; and how was the interest thus made applied?

IV. What bonds on which the said George A. Trenholm & James T. Welsman were as guarantors, or in any other way responsible, were bought with the moneys arising from the said collaterals, or with the moneys of the said George A. Trenholm, directly or indirectly, through his late firm of George A. Trenholm & Son, or with the moneys received from the said James T. Welsman; when bought, and at what price bought?

V. Whether the said bonds, or any one or more of them, have
70 been reissued by the said George A. Trenholm, or any agent or partner of his; and furthermore who now holds such reissued bonds, if any?

VI. To the extinguishment of what, and how many, obligations of the said firm of John Fraser & Co. the moneys paid by the said James T. Welsman to the said George A. Trenholm were applied?

15. That these defendants, further answering, say that to the best of their knowledge, remembrance, information, and belief they have in this their answer, made answer to each of the thirteen interrogatories contained in the said bill of complaint as follows, to wit:

1. To the first and second interrogatories they have answered to the best of their knowledge, remembrance, information, and belief in paragraph 3 hereof.

2. To the third, fourth, and fifth interrogatories they know nothing.

3. To the sixth interrogatory they deny that any other agree-
71 ments & mortgages were made than that set forth in paragraph 6 hereof.

4. To the seventh interrogatory they deny that said bonds have become a lien on the said mortgaged premises.

5. To the eighth, ninth, eleventh, and thirteenth interrogatories they have answered to the best of their knowledge, remembrance, information and belief in paragraph 8 hereof.

6. To the tenth interrogatory, they know nothing of the estate of George A. Trenholm, but believe it to be ample. It is impossible to answer concerning the estate of James T. Welsman till the executor of the said George A. Trenholm furnishes the statements and accounts set forth in paragraph 14 hereof.

7. To the twelfth interrogatory, they know nothing of their own knowledge.

16. And these defendants, further answering, say that they deny
72 all and all manner of combination and confederacy as is by the said bill charged, without that there is any other matter, fact, or thing in the complainant's said bill of complaint contained, material or necessary for them to make answer unto, not herein or hereby well and sufficiently answered, avoided, traversed, or denied, true to the knowledge or belief of these defendants, pray to be hence dismissed with their reasonable costs & charges in this behalf wrongfully sustained.

RUTLEDGE & YOUNG,
H. A. DESAUSSURE,
Att'ys for Ex'ors.

STATE OF SOUTH CAROLINA,
Charleston County:

Wilmot G. DeSaussure, being duly sworn, says that the within answer is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

WILMOT G. DESAUSSURE.

Sworn to before me this 1st December, A. D. 1877.

JENNINGS W. PERRY,
Not. Pub.

73 And on the 4th day of January, A. D. 1878, came into court the defendant William L. Trenholm, by his solicitor, A. G. Magrath, and filed the following answer, which answer is in the words and tenor following:

No. 7.

Answer.

THE UNITED STATES OF AMERICA,
Fourth Circuit South Carolina District:

To the honorable the judges of the circuit court of the United States for the district of South Carolina:

The answer of William L. Trenholm, in his own right, as surviving partner of the copartnership of George A. Trenholm and Son, and as executor duly qualified under the last will and testament of George A. Trenholm, to the bill of complaint of J. L. Phipps, on behalf of himself and other creditors of George A. Trenholm and James T. Welsman, deceased.

This defendant, saving and reserving all advantage and benefit
74 of exception to the said bill of complaint, for answer nevertheless thereunto says:

It is true, as is set forth in the said bill of complaint, that George A. Trenholm, the father of this defendant, did depart this life, and did leave his last will and testament duly executed, which has been duly admitted to probate in the probate court for Charleston County, and this defendant has duly qualified as the executor thereof. It is also true that in his lifetime a copartnership in business did exist between the said George A. Trenholm and this defendant, under the name and style of George A. Trenholm and Son, and the same did continue until the death of the said George A. Trenholm, the closing up of all matters connected with the said copartnership having now devolved upon this defendant as the survivor of the said copartnership, as well as the due administration of the private estate of the said George A. Trenholm as the executor thereof.

75 This defendant, further answering, says it is true, as is set forth in the said bill of complaint, that in the year of our Lord 1867 the commercial house of John Fraser and Company, in the city of Charleston, in the State aforesaid, and the commercial house of Fraser, Trenholm and Company, in Liverpool, in the Kingdom of Great Britain, were obliged to go into liquidation and surrender all the property of the several members of the said firms in satisfaction of the claims of the creditors of the same. That to make the settlement complete George A. Trenholm and James T. Welsman, who had for some time previously ceased to have connection with or to be interested in the said commercial houses, agreed to become the guarantors of certain bonds of Theodore D. Wagner and this defendant, who constituted the principal partners of the commercial house of John Fraser and Company, which said bonds so guaranteed consisted of two series of bonds, one whereof, commonly designated as "B" bonds, amounted in all to $710,000, and the other, commonly

76 designated as "C" bonds, amounted in all to $134,586.93, of which $33,138.51 were an over-issue, leaving the amount of the bonds $101.452.42. That the said bonds were, according to certain articles of agreement made between this defendant and Theodore D. Wagner and the creditors of John Fraser and Company, placed in the hands of Charles T. Lowndes and James Robb, to whom also this defendant and Theodore D. Wagner executed a mortgage of all their real estate as security for the payment of their other bonds, commonly known as "A" bonds, and which bonds were not otherwise secured than by the said mortgage.

This defendant, further answering, says that at the time when the said George A. Trenholm and James T. Welsman guaranteed the bonds hereinbefore described as "B" bonds and "C" bonds this defendant and the said Theodore D. Wagner, representing the said commercial house of John

77 Fraser and Company, had in their possession other assets nominally of a large amount, consisting principally of securities of various kinds, purchased during the war between the United States and the Confederate States, only a portion of which, as this defendant believes, had any fixed or certain value, and the remaining portion of which, as this defendant believes, was and is of little—some, perhaps, of no value. But for greater particularity thereof this defendant refers to such statements of the securities so transferred as were kept by or under the direction of the said George A. Trenholm, and copies of which were, as this defendant believes, furnished to the late James T. Welsman. Beyond the statements so made

up from and appearing in the books directed to be kept by the said George A. Trenholm, and which statements, as this defendant believes, affords all all information concerning the said securities, this defendant has no further information.

78 This defendant, further answering, says, that when the said George A. Trenholm and the said James T. Welsman became, as before stated, guarantors of the said bonds, known as "B" and "C" bonds, they agreed as between themselves that the said George A. Trenholm should assume and pay to the holders of the said bonds four-sevenths of the amounts thereof, and the said James T. Welsman three-sevenths of the amounts thereof, principal as well as interest. And to secure to the holders of the said bonds the payments of these proportions, and so protect and indemnify each the other against any liability for any greater portion or share of the said bonds than the shares or portions so respectively assumed, the said George A. Trenholm and the said James T. Welsman did execute, each to the other, a mortgage of certain property. The property so mortgaged by each to the other is, as this defendant believes, truly set forth in the said bill of complaint, but for greater particularity thereof this defendant refers to the original papers in his

79 hands, as the executor of the said George A. Trenholm, and in the hands of W. G. DeSaussure, R. N. Gourdin, and Emma C. Welsman, the executors and executrix of the said James T. Welsman.

This defendant, further answering, says that he has always understood, and so believes, that during the life-time of the said James T. Welsman he always admitted a liability from him to the said George A. Trenholm, on account of the advances made by the said George A. Trenholm being greater than the proportion of the bonds guaranteed by them, that is, four-sevenths of the principal and interest due on the bonds so guaranteed; and that the said James T. Welsman did offer to surrender all of the property contained in the mortgage from him to the said George A. Trenholm, in satisfaction of the claim made upon him to contribute and pay the proportion of the whole amount of the said guaranty so assumed by him.

80 This defendant, further answering, says that in order to relieve the said George A. Trenholm from the large amounts of the said bonds known as "B" and "C" bonds, and which were guaranteed, as above stated, the said copartnership of George A. Trenholm & Son did, from various persons, make loans of divers sums of money, which were invested in the purchase of a large amount of the said bonds, and which bonds so became the property of and constitute a large portion of the assets of the said copartnership of George A. Trenholm and Son, and applicable to the payment of the debts of the copartnership.

This defendant, further answering, says he believes it to be true, as is stated in the said bill of complaint, that the mortgages made by George A. Trenholm to the said James T. Welsman and the mortgage from the said James T. Welsman to the said George A. Trenholm, were made by the said George A. Trenholm and the said James T. Welsman as mort-

81 gages for the benefit of the holders of the said bonds, if they were not paid by the principal obligors, in consequence whereof the said guarantors would become liable.

And therefore that the plaintiff in the said bill of complaint, and all

other persons being holders of such bonds, are of right entitled to the benefit of the property set forth in the said mortgages to secure the payment of the said bonds now outstanding, so far as may be necessary for that purpose, in the proportions of the aggregate of such outstanding bonds agreed upon by the said George A. Trenholm and the said James T. Welsman to be assumed by each; that is to say, for four-sevenths thereof as the debt of the said George A. Trenholm, and for three-sevenths as the debt of the said James T. Welsman, as well as to secure to this defendant as the executor of the said George A. Trenholm all such sum and sums of money as may have been advanced or paid by the said George A. Trenholm on account of the said bonds so guaranteed beyond the proportion there-
82 of for which, as was agreed upon between the said George A. Trenholm and the said James T. Welsman, the said George A. Trenholm was to be liable.

The remaining portion or three-sevenths were, by the said James T. Welsman, undertaken to be paid by him, being that which the said James T. Welsman, according to the said agreement, was bound to pay, and so to secure the payment of that portion to the holders of the said bonds, and in so doing protect the said George A. Trenholm from any liability, therefore the said James T. Welsman did execute to the said George A. Trenholm the mortgage as set forth in the said bill of complaint.

This defendant, further answering, says it is true, as is stated in the said bill of complaint, that after the death of the said George A. Trenholm Anna Helen Trenholm did institute proceedings before the honor-
83 able George Buist, he then being probate judge of *of* the probate court for the County of Charleston, to have her dower in the real estate of the said George A. Trenholm admeasured according to law, and thereupon such proceedings were had to admeasure the dower so claimed, and the same has been ascertained and admeasured as will appear by the record of the proceedings in that matter in the said probate court.

This defendant, further answering, says he is anxious with all proper expedition and consistently with the rights and interests of all parties concerned in the liquidation of the business of the late copartnership of George A. Trenholm and Son, and the settlement of the estate of the late George A. Trenholm, that all parties holding the bonds hereinbefore referred to and known as the bonds guaranteed by the said George A. Trenholm and James T. Welsman should be called in to make proof of the same,
84 and that the amounts of principal and interest due on the same should be fully ascertained; and thereupon that the executors and executrix of the said James T. Wellsman shall be decreed to pay the proportion of the same for which the said James T. Welsman became bound by the agreement between himself and the said George A. Trenholm; and that this defendant as executor of the said George A. Trenholm be also decreed to pay the proportion of the same for which the said George A. Trenholm became bound under the said agreement, and also that for all such amounts as by the said George A. Trenholm were advanced and paid by him over and above the proportion of the said indebtedness agreed to be paid by him, and the payment of which relieved the said James T. Welsman from so much of liability on account of the said bonds, that the executors and executrix of the said James T. Welsman be decreed to pay the same to this defendant, executor of the said George A. Trenholm; and

85 in default of such payments, that the property of all kinds mentioned in the mortgages from George A. Trenholm to James T. Welsman and from James T. Welsman to George A. Trenholm, be sold and the proceeds applied to the payment of the said bonds in the proportions for which the said George A. Trenholm and James T. Welsman agreed as between themselves to be bound, and to repay this defendant, as executor of the said George A. Trenholm, all sums of money which have been advanced or paid by the said George A. Trenholm beyond the proportion, or four-sevenths, for which it was agreed that he should be bound.

And this defendant, replying to the several special interrogatories, in the said bill of complaint, answers as follows:

To the first, second, third, sixth, eig'th, twelfth, and thirteenth he answers affirmatively.

To the fourth he says he believes that he is.

To the fifth he cannot, of his own knowledge, say accurately.

To the seventh he says he has always so understood.

86 To the ninth he says he believes it to be so.

To the tenth he cannot answer further than to say that the real property mentioned in the mortgages must be sold to pay the said bonds.

To the eleventh he says for greater particularity reference must be had to the proceedings in that matter, as they are of record in the probate court for the county of Charleston.

To the thirteenth he says it is so as stated.

And the said defendant, having fully answered all the matters and things in the said bill of complaint whereunto answer was required, asks to be hence discharged with his costs, &c.

W. L. TRENHOLM, *Ex'r.*
A. G. MAGRATH,
Def'ts' Sol'r.

Answer of Mrs. Anna Helen Trenholm, filed 11th March, 1878.

And on the 11th day of March, A. D. 1878, came into court
87 the complainant J. L. Phipps, by his solicitors, Mitchell & Smith, and filed the following replication, which replication is in the words and tenor following:

No. 8.

Replication.

In equity.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

The replication of J. L. Phipps, on behalf of himself and other creditors of George A. Trenholm and James T. Welsman, deceased, complainants, to the answers of Wilmot G. DeSaussure, Robert N. Gourdin, and Emma S. Welsman, as executors of the said James T. Welsman, Maria C. Otis, and Emma S. Welsman, as executrixes of James Welsman,

deceased, Caroline Napier Welsman, William L. Trenholm, in
88 his own right and as surviving copartner of the firm of George A. Trenholm & Son, and as executor of George A. Trenholm, deceased, and Christopher F. Hampton, administrator of Frank Hampton, deceased, defendants to the said complainants' bill of complaint.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answers of the said defen' are uncertain, untrue, and insufficient to be replied unto by these repliants. Without this that any other matter or thing soever in the said answers contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied is true; all which matters and things these
89 repliants and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

MITCHELL & SMITH,
Compl'ts' Sol'rs.

And on the 6th day of May, A. D. 1878, came into court the defendant Christopher F. Hampton, administrator of Frank Hampton, deceased, by his solicitors, Simonton & Barker, and filed the following exceptions, which exceptions are in the words and tenor following:

No. 9.

Exceptions.

In the circuit court.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

J. L. PHIPPS & CO., PLAINTIFF,
against
THEODORE D. WAGNER ET ALS., DEFENDANTS.

The defendant Christopher F. Hampton, administrator of Frank
90 Hampton, deceased, excepts to the order of the circuit court of the date May 6, 1878, on the following grounds:

That the circuit court of the State of South Corolina for Charleston County has already acquired jurisdiction of the estates of George A. Trenholm, deceased, including the subject-matter of, and parties to, this case, and that the circuit court of the United States for the district of South Carolina has no jurisdiction to grant said order.

That the complainant has not established by his bill the basis of equitable jurisdiction, and cannot compel defendant to answer in this proceeding.

SIMONTON & BARKER,
Attorneys for Defendant.

And on the 6th day of May, A. D. 1878, came into court the complainant J. L. Phipps, by his solicitors, Mitchell & Smith, and obtained the following order overruling exceptions, which order is in the words
91 and tenor following:

No. 10.

Order.

Upon hearing the within exceptions it is ordered that the same be, and they are hereby, overruled.

Charleston, May 6, 1878.

HUGH L. BOND,
C't Judge.

And on the 6th day of May, A. D. 1878, came into court the complainant, by his solicitors, and obtained the following order of reference, which order is in the words and tenor following:

No. 11.

Order of reference.

In the circuit court.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

J. L. PHIPPS & CO. ET AL., PLAINTIFF,
against
THEODORE D. WAGNER ET AL., DEFENDANTS. } In equity. Order of reference.

On hearing read the pleadings in this cause & the solicitors
92 representing the several parties in interest, it is ordered that Samuel Lord, jun'r, esquire, be, & he is hereby, appointed special ma'ter in this case, with directions, by public advertisement in such papers as he shall think proper, for the purpose of giving notice to the parties interested, to call before him at such time & place as he shall designate all persons holding the bonds of T. D. Wagner & W. L. Trenholm, guaranteed by George A. Trenholm & James T. Welsman, whether known as B or C bonds, to make proof of such bonds before him; and he do further inquire into & report on all the issues of law & fact involved in the pleadings, & more especially the nature, priority, & order of the liens securing such bonds, with leave to report any special matter.

It is further ordered that William L. Trenholm, ex'or of George A. Trenholm, & W. G. DeSaussure, R. N. Gourdin, ex'ors, & Emma S. Welsman, executrix of James T. Welsman, account before the said special master, for their administration of the estates of their respective testa-
93 tor, as the same has come into their custody, care, or possession.

It is further ordered that the said special master do report his conclusions of law & facts, as the same may be presented to him, & that with such report he do file all the testimony that may be brought before him.

May 6, 1878.

HUGH L. BOND,
C't Judge.

No. 12.

Testimony and report of special master.

UNITED STATES OF AMERICA,
District of South Carolina:

In circuit court.

J. L. PHIPPS & CO. ET AL.
vs.
THEO. D. WAGNER, WM. L. TRENHOLM, ET AL.

Minutes of reference.

33 BROAD STREET, *June 1st*, 1878.

Present, T. G. Barker, H. E. Young, W. G. DeSaussure, A. G. Magrath, Henry Buist, H. A. M. Smith.

Mr. Smith introduces bonds of Phipps & Co.

Mr. Young proposes that all bonds presented shall be considered as proved, unless special objection is made.

Mr. Smith introduces original agreement of Welsman and Trenholm.

Mr. Barker objects to its admissibility so far as it is introduced to affect Hampton judgment.

Mr. Smith also introduces mortgages of J. T. Welsman to Geo. A. Trenholm, and introduced the bonds of Phipps & Co., and proved the guarantee; also, the mortgage of Jas. T. Welsman to Geo. A. Trenholm.

Adjourned to Tuesday, 4th June, at 10 a. m.

94 JUNE, *6th*, 1878.

A reference being called by special master Samuel Lord, jr., Messss. W. G. DeSaussure, H. A. DeSaussure, Young, Smith, Barker, and Mitchell, being present, the following witnesses were sworn and examined.

THEODORE D. WAGNER, being duly sworn, testified:

Direct examination by Mr. SMITH:

Q. You were a member of the old firm of John Fraser & Co.?

A. Yes, sir.

Q. You were one of the principal obligors on all the bonds given in settlement between yourself and Wm. L. Trenholm?

A. Yes, sir.

Q. You have never paid up or liquidated the bonds then given?

A. No, sir.

Q. A very large amount is outstanding?

A. Yes.

Q. Can you approximate to the amount at all?

A. No, sir.

Q. The amount is absolutely beyond your power to meet?

A. Yes, sir.

Q. You are insolvent, as far as that is concerned?

A. Yes, sir.

Cross-examination by Mr. YOUNG:

Q. You are engaged in business here?

A. Yes, sir.

Q. In the statements of the settlement of the affairs of John Fraser & Co., there was a statement that the first proposition was, that to secure these bonds issued by yourself and William L. Trenholm, and guaranteed by Mr. Trenholm and Mr. Welsman, assets to a very large amount (the first amount stated over $900,000.00) were delivered into the hands of some one to be held as responsible for these bonds—$710,000. Later, I see from the statement that two hundred thousand was deducted and turned over, partly to you and partly to Wm. L. Trenholm, to begin business on. Is that correct?

A. I declare I don't know the amounts; all these things transpired twelve years ago. Philips has a memorandum of the amounts turned over.

95 Q. Of that $200,000.00, which is represented as having been turned back to you and Mr. Trenholm to begin business on, is that still in your business?

A. I don't know of any $200,000.00 returned; I don't know where you got any statement of that kind from. I have to speak entirely from memory. I suppose you got it from the amount that we turned over, which is short of the statement $200,000.00. I should judge that the stocks were valued about the then market value. With regard to the whole statement given at the time, I cannot remember.

Q. You cannot state what amount of that $200,000.00 was turned over?

A. You have all the papers—or whoever took charge of the estate—I never took charge of the papers.

Q. You have no information or recollection?

A. None at all.

Q. You cannot state the amount of the $200,000.00 that was turned over to you?

A. No, I cannot; I suspect you can get the information from Philips. Everything was turned over ten or twelve years ago.

Q. Have you in your business any property by which your debts can be paid, in part or wholly?

A. I have none.

Q. Nor have you any property otherwise?

A. Not one cent otherwise, in any way, shape or form.

Cross-examination by Mr. DESAUSSURE:

Q. At what time was the partition of the assets of John Fraser & Co. made?

A. I would not undertake to say; I don't remember the date. It is all on record. If I had known what questions were to be asked, I would have refreshed my memory.

Q. Was it made by deed?

A. No, sir; I have no papers at all connected with the business.

Q. Do you know who is in possession of them?

A. I think Mr. Lowndes.

Q. Was that partition made anterior to the assignments by yourself and Col. Wm. Trenholm which were subsequently made, under which the "B" bonds were issued?

A. My impression was, prior to it.

Q. At the time that that partition was made, was the firm of
96 John Fraser & Co., of which Mr. Jas. T. Welsman was a partner, solvent or insolvent?

A. They were solvent.

Q. When Jas. T. Welsman's portion of the property of John Fraser & Co. was set out was, the firm solvent or insolvent?

A. Unless I had the date before me and the particulars about it I cannot state positively about it.

Q. At the time that the partition was made between the different members of the firm they were solvent?

A. We considered ourselves solvent.

Q. There was a partition of the property, real and personal, of John Fraser & Co.?

A. Yes, sir.

Q. At that time were they or not solvent?

A. They were solvent.

WILMOT G. DESAUSSURE, being sworn, testified:

Direct examination by Mr. SMITH:

Q. As executor of the estate of Jas. T. Welsman, have you taken an inventory of all the property?

A. Yes, sir, but not filed it yet; I have gone entirely through it.

Q. Is there any personal property of Mr. Jas. T. Welsman that you have ascertained of any value at all?

A. There are a great number of things entered upon the appraisement, notes prior to the war, stocks in the Cuba Iron Company, Rockland Iron Company, and I don't know what all, that would appear to call on their faces for many thousands of dollars; but when I went to New York in the fall to ascertain if they were of any value, I was told that they were worth nothing in the world.

Q. The entire personal estate is merely nominal?

A. It is nominal. There were under hypothecation a great many stocks, some to Gibbes & Co., the Loan and Trust Company, and some to other persons, that have not come into our hands, but have been sold; except in the Loan and Trust Company, the stocks being of greater value than the debt for which he was liable, they permitted us to sell the stock and pay it immediately. Those stocks were sold to take up the stock in the Loan and Trust Company, and left us a balance of about six hundred dollars.

97 Q. There is no personal property that can be subjected to the payment of these bonds?

A. I don't think there is altogether a thousand dollars, though there are apparently on the list, notes and things amounting to very many thousands, but the persons are all insolvent. There are notes of Capt. Coste's to the amount of $8,000.00, and notes of a great many Federal officers, who, while they were in jail, borrowed money from him, but they are utterly worthless.

Q. Are you aware of the existence of any real estate belonging to Mr. Welsman other than that contained in the mortgage?

A. Yes; there is other real estate.

Q. Other than the mortgage to Mr. Trenholm?

A. Certainly.

Q. What is the value of it, according to your judgment?

A. There is in Charleston probably about six or eight thousand dollars; that is, estimating it at our valuation. There is a plantation in Marion that we have been offered $500.00 for; a plantation in Beaufort—whether it is of any value or not I am utterly unable to tell you; I believe it is forfeited for non-payment of taxes, to the best of my knowledge. I have been waiting until after the first of June to see whether we can get it back. There is an interest in lands near Rome, Georgia, which he has. He owns a farm in Pike County, Pa., which I have tried very hard to sell, but have not been able to find a purchaser. Lands in West Virginia—coal mines—which I also went out last winter to try and sell, but could not succeed.

Q. They have no market value?

A. They have no market value at all. There are hundreds of thousands of acres of the same quality of land there.

Q. As executor, you have gone carefully over the assets of the estate?

A. Yes, sir.

Q. And those are all that you have been able to find?

A. Yes, sir.

Q. Do you know, of your own knowledge, how many children Mr. Welsman left?

A. One.

Q. No grandchildren?

A. No.

Q. No wife?

A. No; only one daughter, Miss Caroline M. Welsman.

98 Cross-examination by Mr. YOUNG:

Q. Are there not a large amount of assets which are with Messrs. Simonton and Barker to meet the common debt of John Fraser & Co.?

(Objected to by Mr. Smith as incompetent.)

A. To the best of my recollection, after the death of Major Welsman, a contract which had been partly made by him prior to his death for the sale of a piece of property was finally consummated, and that bond was turned over to Messrs. Simonton & Barker.

Q. That is, the proceeds of the sale?

A. Yes. That is, within my own personal knowledge. In regard to the other bonds that have been turned over by Major Welsman, it was our duty, as executors, to inquire what was the debt due on the Hampton judgment, and I addressed a communication to Messrs. Simonton & Barker, and was answered by them, stating that they did hold other bonds and mortgages which had been turned over to them as part payments on that Hampton debt.

Q. Part payment, or collateral security?

A. Collateral securities—that is to say, Messrs. Simonton & Barker were authorized to collect and pay themselves, but they gave nothing but an accountable receipt, because they would not accept that in payment.

Q. That Hamption judgment is a judgment against the members of the late firm of John Fraser & Co.?

A. Yes. A certain portion of it was assessed as against Major Welsman; that is, in their arrangement between themselves. I had to deal with it as solicitor of Major Welsman even before his death.

Q. Do you know the value of those assets?

A. Their face values, I think, are some eleven or twelve thousand dollars; what their real values are I am not so able to tell.

WILLIAM L. TRENHOLM, being duly sworn, testified:

Direct examination by Mr. SMITH:

Q. You were a partner of the late firm of John Fraser & Co. at the time of its failure in 1867?

A. Yes, sir.

Q. You were one of the principal obligors on the bonds given in liquidation of the debts of that firm?

A. Yes, sir.

99 Q. Yourself and Mr. Wagner were the only two obligors?

A. Yes, sir.

Q. Have the bonds ever been paid by yourself or Mr. Wagner?

A. Do you mean the whole issue?

Q. Has the whole issue been paid, or what portion—the A, B, and C bonds?

(Mr. DeSaussure objected to witness testifying concerning the "A" bonds, as the order relates only to the "B" and "C" bonds.)

A. No, sir; the debt has not been paid. The bonds issued amounted to one million and a half of "A" bonds, seven hundred and ten thousand dollars of "B" bonds, and between one hundred thousand and one hundred and twenty thousand of "C" bonds. At the time Mr. Wagner and I executed these bonds we assigned to Messrs. Robb and Lowndes, as trustees, all real estate that we possessed as collateral security for the payment of the "A" bonds, and subsequently the same parties assigned to my father and Mr. Welsman, by delivery to Mr. Phillips, as their trustee, the other securities that they held—bonds, stocks, and things of that sort—to secure the payment of the "B" and "C" bonds and other liabilities of the new firm of John Fraser & Co., as we called it.

Q. You yourself, personally, have never paid any of those bonds?

A. No, sir.

Q. How many are outstanding?

A. I do not know how many of my own knowledge. I have an impression.

Q. Do you not know, of your own knowledge, how much was paid by the sale of real estate?

A. No, sir.

Q. There is, to your knowledge, a very large amount outstanding?

A. I believe there is a very large amount outstanding. All of the million and a half are outstanding except what has been taken up.

(By request, the referee then made the following statement: "We took up five hundred thousand "A" bonds in exchange of property, and there is a million dollars outstanding on which a dividend of twenty per cent. has been paid, and a final dividend I am about to pay, three-quarters of one

per cent., that is on the face of the bonds, leaving all the arrearages of interest unpaid. Every dollar of real estate is closed, and there is
100 nothing left except a disputed case in Edgefield County. Five hundred thousand dollars with all the arrearages of interest have been absolutely paid. Upon the other there is due the entire million less twenty and three-fourths per cent. paid on account of the principal of the "A" bonds. Of the "B" bonds, $531,741 have been proved up to this time.")

Mr. Trenholm, resuming, stated that there were about one hundred and thirty-two thousand of "C" bonds originally issued; but there was found to be a mistake, and a number was returned—the exact amount he did not remember, so that he stated that there were between one hundred thousand and one hundred and twenty thousand.)

Q. Have you any property of your own, real or personal, that you can apply to the payment of your liabilities?

A. I have some furniture and household articles; I have nothing of any consequence at all, probably not exceeding a thousand dollars in value; small securities, such as Sullivan's Island steamboat stock.

Q. You are absolutely insolvent?

A. I so consider myself.

(Mr. Smith here introduced in evidence certified copy from probate court of the will of George A. Trenholm, with certificate of William L. Trenholm as qualified executor, marked Exhibit 4.)

Q. As executor of your father's estate, you have carefully examined all the assets of your father?

A. Yes, sir.

Q. Can you state what the aggregate value of the personalty is?

A. I filed the inventory as soon as I could go over the personal assets, which is on record in the probate court.

Q. Will you refresh your memory from any memoranda you may have, and state the aggregate value of his personal estate?

A. The sum total of the nominal value is something over a million dollars. The actual value, I think, cannot be put above twenty-five or thirty thousand dollars, without including any of those securities which are pledged as collateral, either for the debts of the testator, or for the debts of Geo. A. Trenholm & Son, of which he was the principal part-
101 ner; and estimating in that, too, any surplus value that there may be in those collaterals over and above the debts. I made a calculation, and I put it between twenty and thirty thousand dollars, by taking two columns, putting the inside and outside values in each case, one in each column.

Q. The value of the personal estate, or that which you can bring into your possession, is not over twenty-five or thirty thousand dollars?

A. No, sir. Of course I do not include in that what ought probably to be regarded as a personal asset, and that is, his claim against the estate of Jas. T. Welsman. I have always considered that that was concluded by an arrangement between Mr. Welsman and myself, by transfer of real estate; and I have always reckoned the value of the real estate of Mr. Welsman as a part of the reality of the estate on which I am administering.

Q. That asset or claim is the valuation of Mr. Welsman's real estate mortgaged to your father?

A. Yes.

Q. And taken by you as due by Mr. Welsman's estate to your father's? (What witness may consider objected as incompetent.)

A. If the claim against Mr. Welsman is a personal asset, then I should have to enter into the valuation of that claim in order to state what is the amount of the personal assets; and I have not sufficient knowledge to say what would be the value of the claim against his estate for a certain amount. But if it is not considered one of the personal assets, and if the executors of Mr. Welsman will carry out the agreement between Mr. Welsman and myself, that the property of Mr. Welsman that I am now in possession of, should be received in settlement of the accounts between the two estates, then I regard it as a part of the real estate of the estate for which I am responsible.

Q. I understand you to say that you estimated the personal assets which can be applied to the payment of the debts at twenty or thirty thousand dollars?

A. Yes, sir.

Q. In addition to that, you say there is a claim of your father's against the estate of Jas. T. Welsman?

A. Yes, sir.

Q. What is your estimate of that?

A. It consists of the bond of Mr. Jas. T. Welsman, stated here at $19,280, with interest from, I believe, 1866; and then the rest of it will be the result of an accounting between the estate of Mr.
102 Welsman and my father's, which cannot be finally made up until there has been some conference between the executors of Mr. Welsman and myself, in regard to certain amounts in that. But I estimate it to be, in any event, considerably over $200,000—largely over that—in addition to this bond and interest.

Q. In your examination of your father's estate, what real estate have you found belonging to it, exclusive of the real estate mortgaged to Mr. Welsman?

A. I had occasion some time ago to value it, and I think the valuation I put upon it was about $20,000.

Q. Will you state what children your father left at the time of his death, and if any of his children predeceased him?

A. He left seven children, as stated in the bill. There is a verbal error in the bill as to the name of the deceased mother of his grandchild; the name should be Anna Helen Morgan, and not Emily Pierre.

Q. He also left his wife surviving?

A. Yes, sir.

Cross-examination by Mr. YOUNG:

Q. What pieces of real estate are there belonging to your father's estate outside of the mortgage?

A. I did not bring a list with me; I will send it to the referee.

Q. In regard to these "B" bonds. Was there not a large amount of assets turned over to your father to meet them?

A. Yes, sir.

Q. Can you give me the amount?

A. No, sir, I cannot.

Q. I find in a letter from your father, Feb. 28, 1868, two statements of the amount (hands letter to witness). Is that his signature?

A. Yes, sir.

The following letter was then put in evidence:

CHARLESTON, *February 28th*, 1878.

MY DEAR MR. WELSMAN: The papers under preparation to carry into execution the agreement between J. F. & Co. and their creditors are nearly completed. Seeing them on Mr. Fanning's desk yesterday, my attention was attracted by a clause in which you and I were made,
103 jointly and severally, guarantors for the $70,000, for which personal security was to be given. This would have made us each liable (as between ourselves) for $355,000, and to the creditors $710,000 each. I went to see Judge Magrath, and told him this did not suit me, and, I thought, would not suit you any better. When I was first informed of the proposals made to the creditors, I at once offered to take $400,000 of the amount. At my age, and with my family, I am not willing to take any more, and prefer the chances of the suits with which we are threatened. This leaves an amount larger, perhaps, than you would willingly have assumed. I don't know if this matter has yet been brought to your attention. Looking at it from my point of view, it does not appear to me disproportionate. Whatever the public may think, as among ourselves, my retirement was absolute and unconditional. This being the case, and it having preceded yours, there is a view of it, in which perhaps I might be supposed to have the right of asking you to go before me in these endorsements. But I have never indulged such thoughts, but, on the contrary, been willing from the first to waive all questions among ourselves, and take a full share of the liability we were called on to assume. Will you call and see Judge Magrath, and have this matter finally disposed of?

The proposal that I should endorse a portion of these bonds was made to me in a letter from William, dated October 17, 1867, and addressed to me at Flat Rock, where I then was. It contained the views then entertained by Mr. Wagner and himself. One paragraph is to the following effect, namely:

"The assets of J. F. & Co., per schedule, are	$699,474
"Deduct real estate, to be mortgaged.....	67,666
	631,808
"Uncle Wagner's, Prioleau's, and mine (excluding real estate)	311,000
	942,808

"These we shall, of course, hold for yours and Mr. Welsman's security, and I feel confident they will be sufficient for that purpose."

104 Of course these securities have since depreciated a great deal, and some have necessarily been sold to pay lawyer's fees, and other expenses; yet eventually, and properly nursed, I hope much will be got out of them. Mr. Wagner proposes to leave all the assets of J. F. & Co. in Mr. Phillips' hands, as at present; and as Mr. Phillips will perhaps have a desk in my office, I will watch over them and endeavour to turn everything to the best account. In this I shall hope to have your co-operation. The private assets of the partners he proposes they shall each

retain, as at present. In this I heartily concur. It will constitute their only capital in business, and the means by which alone they can hope to build themselves up again. In their success we unite, I am sure, in feeling the most lively interest; it will be my study to contribute all I can to it. And it may be said with truth that we have as much at stake upon it as they have, so that motives of self-interest combine with those of friendship in recommending all their plans to our adoption and support.

I am always yours, most truly,

G. A. TRENHOLM.

J. T. WELSMAN, Esq.

Q. You cannot give the amount of assets which were turned over to meet these bonds?

A. No, sir.

Q. Is that what you mean by saying that the amount of indebtedness would have to be the result of an accounting between the two estates?

A. Yes, sir.

Q. Where is that account?

A. It is scattered throughout the books of Geo. A. Trenholm & Son, through a period of ten years.

Q. Is it not made out?

A. I have had it made up as well as I could.

Q. Are those books in your possession?

A. Yes, sir.

Q. Was there not two hundred and odd thousand dollars of securities? (Objected to by Mr. Smith as not responsive to examination-in-chief.) Was there not a large amount of assets turned over to yourself and Mr. Wagner, with which to begin business?

A. No, sir; there was nothing turned over to us we were allow-
105 ed to retain. At the time that we made the treaty with the representatives of the creditors in New York, it was agreed that we should give up our real estate as security for one million and a half of A bonds, and should give an endorsement for seven hundred and ten thousand of B bonds, and in consideration of our giving these bonds for the full amount of the estimated indebtedness, the firms were to go on with their business—Fraser, Trenholm & Co., in Liverpool, and John Fraser & Co., in Charleston. To enable them to go on with their business they were to retain all their other assets, and all over eight shillings on the pound paid by the Liverpool estate. All over eight shillings being provided for by the issue of A and B bonds, it was agreed should go to the continuing partners in firm No. 3.

Q. You do not recollect what was the amount of the assets retained?

A. No, sir.

Q. Do you have any recollection of the amount of assets assigned to your father and Mr. Welsman as collateral security?

A. I cannot give you any idea of their value. I can give you an exact statement of the securities that were turned over at that time.

Q. You don't recollect their estimated value?

A. No, sir; I don't think there was any estimated value put upon them.

Q. Outside of those which were assigned to your father and Mr. Wels-

man as collateral security, was there not also a large amount, some two hundred and odd thousand, retained as capital for the business?

A. Of my own I retained nothing, and I believe Mr. Wagner gave up everything of his. I am sure everything that had been assigned to Mr. Prioleau and left in the hands of Mr. Huger, was given up. But some of these securities had been disposed of in the effort to carry on the business. When this treaty was first made with the representatives of the creditors in New York, there were two classes of bonds agreed to be issued, the "A" and "B" bonds, and all the assets of the remaining partners then existing, except the real estate, was left for the purpose of carrying on the business of John Fraser & Co., and Fraser, Trenholm & Co.

106 They made an effort to carry on the business in 1867 and a part of 1868, when it was found utterly impracticable to do so. In the meanwhile, the holders of a certain class of sterling bills, called the Ingersoll bills, because endorsed by A. J. Ingersoll & Co., of Mobile, gained an action in England, by which they had turned over to them, as specially applicable to their sterling bills, a considerable amount of cotton, which was sold and the proceeds applied to a special dividend on the Ingersoll bills. That took out a large part from the assets applicable to a general dividend, and it became clear that the dividend in Liverpool would not reach eight shillings to the pound within a reasonable time, and the creditors, therefore, who had not yet surrendered their sterling bills, took the ground that eight shillings in Liverpool was guaranteed by the original agreement. We supposed they were to take the risk, and we were to get all that was over the eight shillings. But they took the ground that they had been guaranteed eight shillings, and they refused to carry out the agreement and to withdraw the suits unless the guarantee was made good. Then it was, Mr. Wagner and I applied to my father and Mr. Welsman, to guarantee the eight shillings on the pound; and it was estimated that it would take one hundred and thirty-odd thousand dollars, at the rate of $6.50 to the pound sterling, to make good that estimated deficiency. Thereupon they agreed to do so, provided we would give up to them all the assets that we retained personally and for the firm, to be security not only for the C bonds, which represent the deficiency of one shilling and sixpence in the Liverpool dividend, but for all the liabilities they might have to assume in the general carrying out of the settlement; putting it upon this ground: as we had to give up our business, and we were earning nothing and likely to earn nothing, that we could not expect to give them any assistance in the payment of the bonds which they had guaranteed, and therefore they should be free to apply these assets not only to the payment of the C bonds, but to the B bonds or any other liabilities.

Q. What year was that?

A. That was, I think, in 1868; about the date or just preceding the date of a paper which has been called "Memorandum of final settlement."

107 Q. I see there are three hundred and eleven thousand dollars of personal assets of yourself, Mr. Wagner, and Mr. Prioleau retained. Of that estimated amount, can you tell me what was Mr. Wagner's share?

A. No, sir; I cannot, from memory. They were all in the schedules at the time. I think that letter was anterior to the "Memorandum of final settlement," and anterior to the arrangement made about the C bonds.

Q. You did not retain those personal assets?

A. No, sir.

Q. As stated in this letter, there was your declaration that you held the whole $940,000 for the use of your father and Mr. Welsman, and a subsequent part says that you wished to withdraw from that proposition $311,000 of personal assets and retain them. I understand you to say that that $311,000 was afterwards surrendered to your father?

A. What remained of it, except what was required to carry on the business in the fall of 1867 and the spring of 1868. In the spring of 1868 we found we could do nothing.

Q. Not only all the firm assets, but these personal assets were turned over to Mr. Welsman and your father?

A. Subsequently; what remained of them, except what had been in the meanwhile disposed of.

Q. Can you give the value of the assets turned over, and date?

A. I cannot. In that letter it is stated they had considerably depreciated. Those amounts were generally the par value. There was a large amount of South Carolina railroad stock, which, I think, was taken at from 120 to 125. I have prepared a schedule of everything that was turned over—that I have been preparing in other matters.

Q. Have you the account made out?

A. As near as I can make it out; of course it extends over a long period of time.

Q. I call for that account. When can you furnish it?

A. The accounts are not ready for immediate production.

(Mr. Smith objected as not responsive to examination-in-chief. Mr. Young contended that the testimony was in reply, witness having referred to the transfer of stocks and bonds to Messrs. Geo. A. Trenholm and James T. Welsman, to secure the payment of B and C bonds, &c., in the direct examination.)

108 Q. You spoke of a personal bond of $19,000. Give the history of that bond.

A. I can only give it as a thing about which I cannot say exactly where I derived my knowledge. I am under the impression it was given at the same time that I gave my bond, and Mr. Wagner gave his bond to my father in 1866, when there was a general distribution of the assets of the old original firm No. 1. The property was first valued and then distributed among the different parties entitled. Then it was found that there had been some inequalities; that some of the parties had been overpaid and some underpaid; and that was settled, not by a return of the property, but by these bonds that were given. Mr. Wagner gave his bond. My father was one who had got the least share of the property, and Mr. Wagner gave his bonds for $85,887.53. That is the present face value. And I gave bonds for $104,190.23, and Mr. Welsman for $19,230.57. I think there were some credits on that; I was under the impression that that bond had been originally a larger amount. I believe that was the way that bond originated.

Q. Are you conducting business in the city of Charleston?

A. Yes, sir.

Q. You own no property, nor are interested in no property, except that which you have turned over to the creditors of John Fraser & Co.?

A. None, except what I have stated. I have some stock in the Mount Pleasant Ferry Company and the Charleston Mining Company.

Q. Are you interested in the purchase of Bear's Island?

A. No, sir; not at all.

Q. Your only occupation is your business as a merchant?

A. And as executor of this estate.

(Mr. Young now moved that the reference be suspended until the accounts referred to by witness in the cross-examination be produced. Mr. Smith objected on the ground that the accounts are no part of plaintiff's case, which should not be delayed on account of their non-production. The accounts can be proved by defendants at any time hereafter if they deem it necessary.

The referee overruled the motion to suspend the examination, on
109 the ground that he had no right to delay plaintiff's case until witness could make out a long and intricate account, or stop it entirely, if witness refuses to do so.

To this ruling Mr. Young excepted. Mr. Young then moved that the reference adjourn until the next day, to which Mr. Smith objected, and it was ruled that the examination proceed. Mr. Young excepted. Mr. Young then moved that so much of witness' testimony which states that the estate of James T. Welsman is indebted to the estate of Geo. A. Trenholm be stricken out, unless the accounts are produced. The motion was overruled on the ground that the statement went in without exception at the time, and witness had been cross-examined as to it subsequently. Mr. Young excepted.)

Cross-examination by Mr. DeSaussure:

(Mr. DeSaussure, before proceeding with the examination, called for the pleadings. Mr. Smith objected, on the ground that the rule of court required the pleadings to be read at the first reference. The request was granted by the referee, and the papers sent for. In the meanwhile the examination proceeded, as follows:)

Q. In reply to questions in your direct examination you stated that there had been a partition of the property of John Fraser & Co.

A. There was a partition.

Q. At what time did that partition take place?

A. It took place in the spring of 1866.

Q. Was it by deed or otherwise?

A. I think there were some deeds made in connection with the partition. I cannot speak positively in regard to the matter now.

Q. Are you in possession of those deeds?

A. I don't think I am.

Q. Do you know who has possession of them?

A. I saw one here to-day in this office.

Q. What property was divided at that time?

A. The property of the copartnership of John Fraser & Co., which ceased to exist at the time of the retirement of my father during the war; John Fraser & Co., No. 1.

Q. Who constituted John Fraser & Co., No. 1, whose property was then divided?

A. I think that is all on record in the deed.

110 (Mr. Smith objected to the testimony as not responsive to direct examination.)

B. Did you not reply in answer to your direct examination that there was a partition of the matters of John Fraser & Co.?

A. When I replied just now, I meant that there had been such a partition.

Q. In your direct examination did you not say that a part of your father's estate depended upon an accounting between the estates of Geo. A. Trenholm and Jas. T. Welsman?

A. I said, as well as I can remember, if the executors of Mr. Welsman should carry out the agreement that had been nearly concluded between Mr. Welsman and myself, by which certain real estate was to be transferred to my father's estate in settlement of the accounts between them, that the value of that real estate would determine the amount of an asset of my father's estate which would have to be added to the computation that I had made of his real property. But that if the executors of Mr. Welsman declined to carry out that agreement, then the value of that asset would depend upon the value of a claim against Mr. Welsman's estate, and that I had no means of estimating the value of a claim against Mr. Welsman's estate. There was a subsequent question asked as to what was the amount of the claim against Mr. Welsman's estate, and I said that I could not state accurately what would be the amount of the claim against his estate, because the amount of the claim would depend upon an accounting between the two estates, which accounts could not be made until there had been a conference or settlement between Mr. Welsman's executors and myself.

Q. Has that accounting been yet made between the estate of Mr. Geo. A. Trenholm and the estate of Mr. Welsman?

A. No, sir.

Q. In your direct examination you stated that there had been some arrangement between the late Mr. Welsman and yourself in regard to turning over property.

A. Yes, sir.

Q. Was the present plaintiff, Mr. Phipps, any party to that agreement?

A. No, sir; not to my knowledge.

(Mr. DeSaussure here read replication of J. L. Phipps, and sub-
111 mitted that the affirmative is cast upon plaintiffs to deny, and show that all which is alleged in 8th paragraph of the answer of Mary C. Otis, and M. S. Welsman executrix of James T. Welsman, in regard to their being any indebtedness between Geo. A. Trenholm and Jas. T. Welsman until the account is rendered, in consequence of an amount of bonds having been placed in the possession of Geo. A. Trenholm to take up an amount of which the bonds now sued on are a part, is "insufficient, untrue, &c." The referee ruled that the matter did not come up for decision at this point.)

Q. In your answers to the direct examination, did I understand you as saying, that of the real estate which was unpartitioned and belonged still to John Fraser & Co., No. 1, that had been the real estate which had been conveyed to Messrs. Robb and Lowndes?

A. No, sir.

Redirect examination by Mr. SMITH:

Q. You said that a certain amount of the personal estate of the firm of John Fraser & Co., or the partners, was retained by you after the failure, when you attempted to carry on the business of the two firms. Did I understand you to say that those personal assets were subsequently transferred by yourself and Mr. Wagner, when those firms were broken up, and you went in with your father, and Mr. Wagner and Mr. Huger went together, that those were transferred to your father and Mr. Welsman to indemnify them?

A. What remained of those assets; what had not been disposed of. All that remained were transferred to Mr. Welsman and my father.

Q. You and Mr. Wagner retained nothing of those original assets that you retained before?

A. We retained nothing after the settlement was made. Mr. Philips was the custodian of all those assets, but my father considered himself as responsible.

Q. But it was for the benefit of your father and Mr. Welsman?

A. It was for the joint benefit of my father and Mr. Welsman. My father never had these assets actually in his own custody, nor did Mr. Welsman.

112 Q. You were cross-examined as to nine hundred and odd thousand dollars transferred by the firm to your father and Mr. Welsman for their benefit. You have a list of that?

A. Yes, sir.

Q. About how much of that has come into your possession as executor of your father's estate?

A. I have not taken out of Mr. Philips' hands the remainder of these assets. They are nominally under my control, but they remain in his possession; I have not taken them out as assets of my father's estate in any way at all, except a few which accidentally came into my hands. I consider them of very little value—what remains of them.

Q. Have you examined them?

A. Yes, sir.

Q. Are they of any value?

A. Very little or no value.

Q. Can you approximate as to the market value?

A. I really consider them practically of no value—that is, what remains of them.

The case for plaintiffs here closed. Mr. DeSaussure asked that a subpœna duces tecum be issued to examine Wm. L. Trenholm, on Monday next, at 12 o'clock m., until which time the reference then adjourned.

113 JUNE 10, 1878.

Reference resumed according to adjournment.

Present, Special Master Samuel Lord, jr., Messrs. Mitchel, Smith, Campbell, W. G. DeSaussure, H. A. DeSaussure, Magrath, Henry Buist, Young, Barker, and Siegling.

Messrs. Campbell and Buist, representing holders of bonds, claimed the right to be heard before the case for plaintiffs closes, and requested additional time.

On motion, the referee was authorized to print proceedings and testimony.

Mr. Buist gave notice that he would require the terms of the order with reference to the acounting of the executors of Geo. A. Trenholm and Jas. T. Welsman, before the special master, to be complied with.

The reference then adjourned until Wednesday, 12th instant, at 12 o'clock, m.

JUNE 12, 1878.

Reference resumed.

Present, Special Master Sam'l Lord, jr., Messrs. Mitchel, Smith, Campbell, Magrath, Buist, Young, Siegling, W. G. DeSaussure, H. A. DeSaussure, and Barker.

JAS. LAMB JOHNSTON, sworn, testified that he is a clerk in the South Carolina Savings Bank, and that said bank held $104,000 of bonds, as collateral security for a note of Geo. A. Trenholm for $26,000 to the Carolina Savings Bank, dated August 8th, 1876, with interest from date, and after maturity at the rate of one per cent. per month. The above note was introduced in evidence, also letter dated February 5, 1876, from Geo. A. Trenholm & Son to Geo. W. Williams, copies of which are filed, marked Exhibits 1 and 2. "B" bonds securing these notes were produced, amounting $104,000.

Mr. Buist stated that the bonds of Mr. Beale, proved by Messrs. Buist & Buist, to the amount of $1,484, are bonds taken in exchange for bonds due by John Fraser & Co., and have been held by them continuously from that time to the present.

114 W. B. BURDEN, being duly sworn, says the Bank of Charleston, holds $79,600 of bonds as collateral for the following notes: Note of Geo. A. Trenholm & Son for $10,660.79, note of Geo. A. Trenholm & Son for $10,709.47, and note of Geo. A. Trenholm & Son for $12,772.05, amounting in all to $38,413.55. It is claimed that these bonds are also collaterals for sundry notes of Geo. A. Trenholm & Son, amounting to $3,550, and a note of $8,003.73. These notes are secured by other collaterals, and it is only claimed that these bonds should make good any deficiency in those collaterals. The bonds were produced.

W. G. DESAUSSURE, Jr., sworn, produced bonds held by the Home Insurance Company, to the amount of $25,000, securing note of G. A. Trenholm for $15,000. Copy of note introduced in evidence, and marked Ex. 3.

THO. W. PERRY, sworn, testified that he is a clerk in the South Carolina Loan and Trust Company, which bank held guaranteed "B" bonds to the amount of $20,000 to secure a note of G. A. Trenholm & Son for $3,500. A copy of the note is herewith filed as Exhibit 4.

D. HUGHES, sworn, says, the First National Bank of Charleston held $90,000 of bonds; $9,600 were bonds originally delivered to the bank in settlement of a claim against John Fraser & Co., and held by them continuously since, and of which they are absolute owners. Notes for which the

other bonds are held as collateral were produced and proved, amounting in the aggregate to $42,240.75, and copies are herewith filed, marked Exhibit 5.

Mr. Young for Mr. Mordecai, produced bonds of Q. Q. Quigley. Four of these bonds, $500 each, he stated are endorsed by but one trustee. Mr. Quigley was admitted by counsel to be an original holder.

H. D. ALEXANDER, sworn, states that the Union Bank holds
115 $40,814.08 of bonds as collateral security on three notes of Geo. A. Trenholm & Son, amounting to $11,000. Bonds produced, and copies of notes are herewith filed as Exhibit 6.

Gen. DeSaussure produced in evidence bonds proved by him as trustee of Morgan; also note dated June 10, 1876, for $1,656.52, signed by G. A. Trenholm, per att'y W. L. Trenholm, for which the bonds are held as collateral. These bonds have no special endorsement.

Gen. DeSaussure also produced bonds held by him as trustee of Hazard, and proved in this case, amounting to $13,050. No special endorsement. These bonds are held as collateral to secure an open account for the value of forty shares of Graniteville stock transferred to Geo. A. Trenholm, May 22, 1873.

Mr. Smith here stated that he had already put in evidence the bonds of J. L. Phipps, and declined to introduce any further evidence as to ownership, submitting that possession of these bonds was prima facie evidence of ownership.

The reference then adjourned until Friday, 14th instant, at 12 m.

116 JUNE 14, 1878.

Reference resumed before special master Samuel Lord, jr. Present, Messrs. Mitchell, Smith, Campbell, Magrath, Young, Barker, H. A. DeSaussure, Buist, and Siegling.

Mr. Barker produced "B" bonds of Henry W. Wiggins, proved in this case, $3,000; also, "B" bonds held by Mrs. E. H. Moffett, $4,000, as collateral to secure note of Geo. A. Trenholm, for $2,000, and interest from September 3, 1877, at ten per cent; "B" bonds of Sarah S. Benedict, $2,000; "B" bonds of Sarah S. Benedict, Frederick Cromwell, Samuel H. Seaman, John H. Clark, and John E. Parsons, trustees for George Cromwell, and Henry B. Cromwell, $8,726.82; "B" bonds deposited at various dates by Geo. A. Trenholm & Son, on behalf of George A. Trenholm as collateral security to Hampton bond and judgment. By an arrangement between themselves, Mr. Trenholm and Mr. Welsman agreed to divide the amount for which they were both liable, each giving a bond for his assumed share, subject to the judgment which secures the whole amount for which both are liable. The amount of Mr. Trenholm's assumed share remaining unpaid is $21,100.04, with interest at ten per cent., from 11th July, 1877. The amount of Mr. Welsman's share unpaid is $6,328.92, with interest from 23d May, 1878. These two amounts, added together, represent the whole amount remaining due on the Hampton judgment. The following "B" bonds, deposited on behalf of Mr. Geo. A. Trenholm as collateral security for the Hampton debt and judgment, are held by Simonton & Barker, as attorneys for C. F. Hampton, administrator of estate Frank Hampton, as per endorsements in Mr.

Philips' handwriting on packages "B" bonds "collaterals with Messrs. Simonton & Barker, as collaterals to Col. Hampton's judgment, as per Mr. G. A. Trenholm's letter of 30th September, 1874" $25,000 00
Of these were withdrawn December 4, 1874..... 17,000 00

Balance remaining on deposit..... $8,000 00

117 "B" bonds, "part collaterals to Hampton judgment, pledged 22d March, 1876, on collection of $1,750, balance first instalment on bond C. C. Pinckney, jun., which formed part collaterals to said judgment"..... ..... 3,500 00
"B" bonds "18th January, 1877, deposited with Messrs. Simonton & Barker, as additional collateral security to Hampton bond and judgment, to enable G. A. T. & Son to collect $3,500 instalment due 1st January, on Pinckney bonds, when he is ready to pay"..... 7,000 00
Memorandum. (Of these bonds Nos. 440 and 439, for $500; bond No. 614, for $1,000; and bonds No'. 556, 561, 298, 299, and 274, for $200, each have printed endorsement, signed by J. T. Welsman.)
"B" bonds, pledged 10th February, 1876, with Messrs. Simonton & Barker, as part collateral security to Hampton judgment on collection of $1,750 on account principal Pinckney bonds..... 3,500 00
"B" bonds deposited by G. A. T. & Son 11th July, 1877, to Hampton debt, with Messrs. S. & B..... 6,000 00
(Of these bonds Nos. 1353, 1507, 1508, 1351, 1352, each for $1,000, contain the printed endorsement signed by J. T. Welsman.)
Total "B" bonds held by estate F. Hampton as collaterals.. .....
Mr. Barker also proved "B" bonds held by Mrs. A. W. Alston..... 4,487 50
with interest, payable by special agreement, from 1st January, 1876, at ten per cent. per annum, payable semi-annually.
"B" bonds held by C. K. Huger, trustee..... 1,000 00
with interest at ten per cent. from 1st January, 1876, payable semi-annually, by special agreement.

118 Wm. Thayer stated that of the bonds proved by C. T. Lowndes $26,122.89 are bonds held by the trustees as commissions originally issued to them; the bonds have not been paid, but Mr. Trenholm gave a note for the amount of the bonds in order to fix the rate of interest. $1,900 of bonds proved were bonds bought in New York. Witness to furnish copy of notes, with statements of payments.

The account of the "B" bonds rendered by the trustees in the case of "The United States vs. Robb and Lowndes, trustees, et al.," was introduced in evidence and its correctness proved by Mr. Thayer. This account shows balance of $33,387 "B" bonds on hand at that time, May 24, 1873. This balance was consumed in the payment of accounts under orders of the United States court and in commissions to the trustees.

By Mr. MAGRATH:

Q. The bonds which you have produced are the original bonds as they were in the hands of Robb and Lowndes?

A. Yes, sir; I had them in charge myself.

Q. And they were transferred from Robb and Lowndes in the capacity of trustees to Robb and Lowndes individually for their compensation?

A. Yes, sir.

Q. After that there was an agreement for the sale of those bonds?

A. No, sir.

Q. Connect the note with the transaction.

A. A settlement was asked of Mr. Trenholm, and he said it was not convenient; and Mr. Lowndes told him he would not press him, and took his note for his convenience, changing the rate of interest, and I held the bonds. The payments on the note were to liquidate the bond, and whatever has been paid will be credited on the account.

Q. You accommodated Mr. Trenholm by taking his note, with an increased rate of interest?

A. Yes, sir.

Mr. Young produced bonds held originally by the Charleston Gaslight Company.

Mr. Smith produced bonds of Henry Eyre, proved in this case. It is admitted by counsel that these bonds were originally issued to
119 Mr. Eyre by the trustees for a debt due to him by John Fraser & Co. The bonds are endorsed as follows: "The proportion of the within bond for which the within-bound Jas. T. Welsman is liable, that is to say, thirty-one of the seventy-one parts thereof, have been paid by Geo. A. Trenholm; for that sum, with interest, Jas. T. Welsman is indebted to Geo. A. Trenholm, and the mortgage from Jas. T. Welsman to Geo. A. Trenholm, bearing date May 3, A. D. 1869, and recorded in the mesne conveyance office, Charleston County, in book H, No. 15, page 571, is acknowledged by Jas. T. Welsman to be security for the same to the said Geo. A. Trenholm, or his assigns.

(Signed) "J. T. WELSMAN."

The above endorsement was admitted by counsel to have been accidentally placed on these bonds.

The reference then adjourned until Tuesday, 18th instant, at 12 m.

120 JULY 29, 1878.

Reference resumed before special master Samuel Lord, jr. Present, Messrs. Magrath, Buist, H. A. DeSaussure, Jas. Simons, jr., and H. E. Young.

Mr. Buist presented an affidavit, executed in New York, showing that the bonds presented and proved by Maitland, Phelps & Co., were a part of the B bonds originally issued, and have been held by Pickersgill and themselves since their issue.

Col. Wm. L. Trenholm produced the accounts called for by Gen. DeSaussure, and they were put in evidence and marked Exhibit —

Col. Trenholm submits the following statement:

The accounts required by Mr. DeSaussure are now submitted, as follows:

Philips' handwriting on packages "B" bonds "collaterals with Messrs. Simonton & Barker, as collaterals to Col. Hampton's judgment, as per Mr. G. A. Trenholm's letter of 30th September, 1874" $25,000 00
Of these were withdrawn December 4, 1874..... 17,000 00

Balance remaining on deposit..... $8,000 00

117 "B" bonds, "part collaterals to Hampton judgment, pledged 22d March, 1876, on collection of $1,750, balance first instalment on bond C. C. Pinckney, jun., which formed part collaterals to said judgment"..... ..... 3,500 00
"B" bonds "18th January, 1877, deposited with Messrs. Simonton & Barker, as additional collateral security to Hampton bond and judgment, to enable G. A. T. & Son to collect $3,500 instalment due 1st January, on Pinckney bonds, when he is ready to pay"..... 7,000 00
Memorandum. (Of these bonds Nos. 440 and 439, for $500; bond No. 614, for $1,000; and bonds No'. 556, 561, 298, 299, and 274, for $200, each have printed endorsement, signed by J. T. Welsman.)
"B" bonds, pledged 10th February, 1876, with Messrs. Simonton & Barker, as part collateral security to Hampton judgment on collection of $1,750 on account principal Pinckney bonds..... 3,500 00
"B" bonds deposited by G. A. T. & Son 11th July, 1877, to Hampton debt, with Messrs. S. & B..... 6,000 00
(Of these bonds Nos. 1353, 1507, 1508, 1351, 1352, each for $1,000, contain the printed endorsement signed by J. T. Welsman.)
Total "B" bonds held by estate F. Hampton as collaterals.. .....
Mr. Barker also proved "B" bonds held by Mrs. A. W. Alston..... 4,487 50
with interest, payable by special agreement, from 1st January, 1876, at ten per cent. per annum, payable semi-annually.
"B" bonds held by C. K. Huger, trustee..... 1,000 00
with interest at ten per cent. from 1st January, 1876, payable semi-annually, by special agreement.

118 WM. THAYER stated that of the bonds proved by C. T. Lowndes $26,122.89 are bonds held by the trustees as commissions originally issued to them; the bonds have not been paid, but Mr. Trenholm gave a note for the amount of the bonds in order to fix the rate of interest. $1,900 of bonds proved were bonds bought in New York. Witness to furnish copy of notes, with statements of payments.

The account of the "B" bonds rendered by the trustees in the case of "The United States vs. Robb and Lowndes, trustees, et al.," was introduced in evidence and its correctness proved by Mr. Thayer. This account shows balance of $33,387 "B" bonds on hand at that time, May 24, 1873. This balance was consumed in the payment of accounts under orders of the United States court and in commissions to the trustees.

By Mr. MAGRATH:

Q. The bonds which you have produced are the original bonds as they were in the hands of Robb and Lowndes?

A. Yes, sir; I had them in charge myself.

Q. And they were transferred from Robb and Lowndes in the capacity of trustees to Robb and Lowndes individually for their compensation?

A. Yes, sir.

Q. After that there was an agreement for the sale of those bonds?

A. No, sir.

Q. Connect the note with the transaction.

A. A settlement was asked of Mr. Trenholm, and he said it was not convenient; and Mr. Lowndes told him he would not press him, and took his note for his convenience, changing the rate of interest, and I held the bonds. The payments on the note were to liquidate the bond, and whatever has been paid will be credited on the account.

Q. You accommodated Mr. Trenholm by taking his note, with an increased rate of interest?

A. Yes, sir.

Mr. Young produced bonds held originally by the Charleston Gaslight Company.

Mr. Smith produced bonds of Henry Eyre, proved in this case. It is admitted by counsel that these bonds were originally issued to
119 Mr. Eyre by the trustees for a debt due to him by John Fraser & Co. The bonds are endorsed as follows: "The proportion of the within bond for which the within-bound Jas. T. Welsman is liable, that is to say, thirty-one of the seventy-one parts thereof, have been paid by Geo. A. Trenholm; for that sum, with interest, Jas. T. Welsman is indebted to Geo. A. Trenholm, and the mortgage from Jas. T. Welsman to Geo. A. Trenholm, bearing date May 3, A. D. 1869, and recorded in the mesne conveyance office, Charleston County, in book H, No. 15, page 571, is acknowledged by Jas. T. Welsman to be security for the same to the said Geo. A. Trenholm, or his assigns.

(Signed) "J. T. WELSMAN."

The above endorsement was admitted by counsel to have been accidentally placed on these bonds.

The reference then adjourned until Tuesday, 18th instant, at 12 m.

120 JULY 29, 1878.

Reference resumed before special master Samuel Lord, jr. Present, Messrs. Magrath, Buist, H. A. DeSaussure, Jas. Simons, jr., and H. E. Young.

Mr. Buist presented an affidavit, executed in New York, showing that the bonds presented and proved by Maitland, Phelps & Co., were a part of the B bonds originally issued, and have been held by Pickersgill and themselves since their issue.

Col. Wm. L. Trenholm produced the accounts called for by Gen. DeSaussure, and they were put in evidence and marked Exhibit —

Col. Trenholm submits the following statement:

The accounts required by Mr. DeSaussure are now submitted, as follows:

1st. Tabulated statement of the collaterals, showing—
1. Collaterals handed Mr. J. E. Phillips.
2. Collaterals still in hand of J. E. Phillips.
3. Collaterals sold and collected.
4. Amount realized on latter, viz: $395,232.00.

Accompanying this statement are thirty-one sheets, explanatory of all such matters as are not obvious prima facie.

2d. An account extending from February, 1868, to March, 1875, embracing the items of the accounts on the books of John Fraser & Co., in liquidation, and of G. A. Trenholm & Son, in liquidation, which recorded transactions relating to the collaterals placed with Messrs. G. A. Trenholm and J. T. Welsman, for account of Messrs. T. D. Wagner and W. L. Trenholm, against the latter's bonds, known as B and C bonds, endorsed by former.

Debit balance of this account		$381,145 08

NOTE.—In transcribing this account, I have distinguished, by means of separate columns, the sums belonging to the following heads, so as to show an analysis, as follows:

121	Payments on general account	$439,566 12	
	Payments on B and C bonds and interest	531,616 61	
			$971,182 73
	Receipts from collaterals	$423,162 16	
	Receipts from other sources	166,875 49	
			590,037 65
	Excess of payments over receipts		$381,145 08

3d. Statement of C bonds:

Issue		$101,448 42
Amount retired	$97,052 90	
Provided for	4,395 52	
		$101,448 42

4th memoranda of B bonds outstanding and amount due thereon, as claimed, without interest:

Face of bonds	$680,145 04
Claims	$464,846 29

These accounts have been made up from other accounts and from books and records in my hands as executor of the estate of Mr. G. A. Trenholm and surviving copartner of G. A. Trenholm & Son, and I believe them to be accurate and comprehensive, but I wish to say that I had little or no personal knowledge at the time of their occurrence of the transactions of which the results appear in these accounts, because up to the summer of 1875, when his health gave way, my father alone directed whatever related to the collaterals and endorsed bonds.

Summarizing the accounts herewith it appears:

1st. That the amount realized from collaterals, as per credits in the account (No. 2), is		$423,162 16
Amount B and C bonds, payment per ditto		531,616 61
Excess of payments over receipts		$108,454 45
122 2d. Payments on other accounts than B and C bonds, to a large extent, sums paid to release the collaterals in pledge when J. Fraser & Co. failed, lawyer's fees, and other legal expenses, clerical and other charges, amount to	$439,566 12	
Less receipts aliunde	166,875 49	
Excess of payments		$272,690 63
Total excess		$381,145 08
3d. In verification of so much as relates to B and C bonds:		
C bonds retired and provided for		$101,448 42
B bonds retired and reduced in claim, original issue	$710,000 00	
Present claims	464,846 29	
		245,153 71
Principal paid		$346,602 13
Interest during seven years on the mean between $810,000, original amount and present amount, $464,000, say $637,000, at 6 per cent. per annum, 42 per cent. would be		$267,540 00
So that upon this estimate the total might be		$614,142 13
The amount shown per account is		531,616 61
Which is less than a reasonable estimate by		$82,525 52

W. L. TRENHOLM.

123 WEDNESDAY, *October* 23, 1878.

Reference resumed before special master Samuel Lord, jr. Present, Messrs. Mitchell, Smith, W. G. DeSaussure, Henry A. DeSaussure, Magrath, Buist, Hayne, Barker, Simons, Young, and Simonton.

On behalf of Messrs. Buist & Buist, the following memorandum was entered upon the minutes: The bonds of the South Carolina Loan and Trust Company, amounting to $20,000; those of the First National Bank of Charleston, amounting to $90,000, and those of Maitland, Phelps & Co., amounting to $23,600, were produced and proved at previous references.

Col. W. L. TRENHOLM, being recalled, in conformity with the requisition of Gen. W. G. DeSaussure, as solicitor of the trust estate of Mrs. Hazzard, submitted accounts showing the collaterals placed in the hands of Mr. Phillips, as trustee of John Fraser & Co., the amounts realized from them and the disbursements.

This list contains all the collaterals actually delivered in accordance with the project made at that time, and those three columns express first, the number of each kind of collateral; second, the designation, and third the par value. The fourth column contains the par value of such of these collaterals as still remain in the hands of Mr. J. E. Phillips, who has always held them. They were delivered to him; he received them for my father and Mr. Welsman, and he has them in his custody still. He has kept all the accounts and is prepared to vouch every item of those accounts. The fifth column contains the par value of such of these collaterals as were sold or collected, and the last column the amount of money realized from such sales and collections; so that this account shows in its aggregate the par value of the securities turned over, the par value of such as remain on hand, and the actual amount in money obtained from such collections and sales. The first item, "bonds receivable," is the designation of an account on the books of John Fraser & Co., which was to keep a record of all the
124 personal bonds held by that firm. The last page gives the list in detail of these bonds receivable.

Witness then read over the statement.

By the MASTER:

Q. There were no other securities turned over?

A. There were no other securities that I know of.

Q. Was there any agreement subsequently made in writing, showing on what trust these bonds were surrendered?

A. I do not know of any.

Q. They were surrendered under the letter of your father to Mr. Welsman, of which you spoke at a previous examination?

A. Under that letter and various conversations; there may be something written that I do not know of. The parties in the conversations I refer to were Mr. Welsman, my father, Mr. Wagner, and myself. When I was having this paper made up I desired Mr. Phillips to go back to the original memoranda of everything that was turned over to him, so that if mistakes had been made they might not be perpetuated. Gen. DeSaussure has called my attention to an item, "Bonds, State of South Carolina, amounting to $29,700," which, in the list furnished Mr. Welsman, is stated at $25,000; so there appears to be $4,000 more on this list. Mr. Phillips told me that there were discrepancies which he had found between this list and that handed to Mr. Welsman which he could not account for, but that he had prepared a statement of those discrepancies, and that statement I am willing to produce at the proper time.

Examination by Mr. W. G. DESAUSSURE:

Q. How many of the $188,000 of the Charleston and Savannah Railroad bonds have been sold, and what did they net?

A. The $188,000 bonds of the Charleston and Savannah Railroad, first lien, State guarantee, are given in this list in three lines. The first consists of 25 bonds of the par value of $12,500, all realized
125 and yielding $6,060.67. The second line contains 161 bonds of the par value of $80,300, all realized and yielding $1,060. The explanation of that line is this: There were 161 bonds of the par value of $80,000; 28 bonds of which were converted into 140 shares of stock of the Savannah and Charleston Railroad of the par value of $14,000.

Of those 140 shares of stock, 34 shares were transferred to Mr. James B. Campbell, 106 were sold to Mr. T. D. Wagner, for his note, the final payment of which, in March, 1873, was $661.91, but the sale was for $1,060. That accounts for the 140 shares into which 28 bonds were converted, 34 shares sold to Mr. Campbell, and 106 sold to Mr. Wagner, and $1,060 collected; 30 bonds were converted into 150 shares of stock of the Savannah and Charleston Railroad Company, and were transferred to Mr. James B. Campbell; 130 bonds were converted into 515 shares of stock of the Savannah and Charleston Railroad Company, and those 515 shares were delivered to the First National Bank of Charleston, with $1,000 in cash, in settlement of the note given for the purchase of the bonds, and to which the bonds were collateral. That accounts, therefore, for the 28 bonds converted into 140 shares, 30 into 150 shares, and 103 bonds converted into 515 shares, making the 161 bonds entered upon the second line; the total amount of money received being $1,060. The shares into which the bonds were converted were at the bank pledged for those notes, and the bonds had to be realized and settled in that way, and $1,060 was all that we got out of it.

By Mr. YOUNG:

Q. What were they transferred to Mr. Campbell for?

A. I think for his share of the operation; it was some joint operation; I haven't a distinct recollection, but I remember John Fraser & Co. had a half interest, Mr. Campbell one-quarter, Mr. John S. Ryan one-quarter, and it was being carried in the bank on their joint notes; and I remember my father had a good deal of trouble in getting it closed up. That was all the money realized; the rest had to go in settlement of the notes.

126 Q. The third line accounts for the two bonds remaining. Those two bonds were sold for $600. Therefore the total amount realized from those bonds in money was $7,720.67.

Q. There were two Charleston & Savannah Railroad bonds for $1,000 each. What has become of them, and what did they net?

A. The par value is $3,000, and they netted $2,000.

Q. There were 187 Greenville and Columbia Railroad bonds of $500 each, and then eight of $100 each. How many of those have been sold, and how much did they net?

A. This statement calls for 162 bonds and certificates of indebtedness of the Greenville and Columbia Railroad of the par value of $81,000. The discrepancy I am not able to explain at this moment; those 162 bonds realized $31,303.66 and here is the explanation of it: There were originally 158 bonds and certificates of indebtedness for $500 each, amounting to $79,000; there were coupons funded in four bonds additional of $500 each, which made 162 bonds, amounting to $1,000 at par. On the 23d of May, 1868, six of those bonds were sold and credited to collateral account, $750. On the 25th of May, 1868, ten bonds were sold and credited to collateral account, $1,250. On the 30th of June, of the same year, 34 bonds were sold and put into 400 shares in the stock of the Memphis and Charleston Railroad Company, which stock was afterwards sold and yielded $5,600. On the 11th of June, 1869, eight bonds of the par value of $4,000 were delivered to Messrs. Magrath & Lowndes, for their fee in kind for settlement of that matter with the Greenville and Colum-

bia Railroad Company. On the 28th of May, 1870, 20 bonds were sold by the bank of the State of New York, and are accounted for in the collateral account, yielding $7,211.77; and on the 2d of January, 1872, and the 20th of April, 1872, 84 bonds were sold to Mr. Trenholm and Mr. Welsman, and are accounted for in collateral for $22,091.89; that is, they took them for that sum.

Q. Are those all Greenville and Columbia Railroad bonds put down at 162 bonds?

A. Yes, sir; of the par value of $81,000, and those 162 yielded $36,903.66.

127 By Mr. MAGRATH:

Q. Is that the gross or the net amount?

A. That is the net.

Q. There were eight Greenville and Columbia Railroad bonds, $100 each. What of those were sold, and what did they realize?

A. They do not appear on the list.

Q. 74 South Carolina Railroad bonds, $500 each. How many were sold, and what did they net?

A. 94 South Carolina Railroad bonds—I think, probably, in the original list they got put down as Greenville and Columbia Railroad bonds. There were 94 South Carolina Railroad bonds, par value $47,000, which were sold and yielded $19,058.76 to the collateral account. The explanation of that is, there were 60 bonds, of $500 each, and 34 bonds, of $500 each, making 94 bonds of the par value of $47,000. Of those bonds 60 are accounted for in the collateral account, yielding $19,058.76; 34 were attached as collateral security to a note of John Frazer & Co., in the Leather Manufacturers' Bank in New York; they were sold to the South Carolina Railroad Company, and two notes taken, one for $4,037.50, at 30 days, and the other for $12,112.50. On the 20th of January, 1869, the note for $4,037.50 was anticipated by the South Carolina Railroad, and the amount was credited in the collateral account kept by J. E. Phillips. On the 15th of April, 1869, the note for $12,112.50 was discounted by Lafitte & LaConte, in New York, and the proceeds applied in the reduction of John Fraser & Co.'s notes of $48,000 to $35,000, at the Leather Manufacturers' Bank, as per Lafitte & LeConte's letter. That accounts for the 94 bonds of the South Carolina Railroad.

By the MASTER:

Q. What was the cash realized?

A. $19,058.76 and $4,037.50. The entry in the list of collaterals of the 94 bonds of the South Carolina Railroad having realized but
128 $19,058.76 is erroneous; the amount should be $19,058.76 + 4,037.50; and this amount is in the account rendered in detail under date of January 20th, 1869, and also in the explanatory sheets.

Q. What was the connection of the Leather Manufacturers' Bank with these collaterals?

A. A large part of the collaterals designed to be turned over was pledged at the Leather Manufacturers' Bank before the failure of John Fraser & Co., and this is one of the notes. We find all through the accounts amounts paid to that bank in order to release those collaterals.

Q. The next item is "Certificate of indebtedness of the South Carolina Railroad Company."

A. $541.18 amount received, and the same amount credited to collateral account. Bonds of the South Carolina Railroad, $29,700; on hand, $2,000; sold and collected, $27,000; yielding $19,626.76, and credited to collateral account. Next, King's Mountain Railroad Company, $20,000; on hand, nothing; realized, $14,000. There are certain items of this account that are not prima facie evident, which I will pick out as they occur. 167 shares of stock of the Batesville Manufacturing Company, which yielded $3,060. They were put down in the list of collaterals, 167 shares; 102 shares were sold and accounted for, and 65 shares were sold and the proceeds credited to Mr. Geo. A. Trenholm on the books, and Mr. Phillips says that when they came to look into the stock they found that they were not part of the collaterals, but my father's individual property.

Q. Look at the Charleston Dry Dock shares and say what they realized.

A. They realized $4,892.40.

Account marked Ex. 2 was then taken up, and witness, in explanation, stated:

When I received the notification, through Judge Magrath, from Mr. DeSaussure, some time ago, I desired Mr. Philips to make up a complete account of everything relating to any transaction of John Fraser & Co., with which my father had anything to do. There were four accounts on the various books of John Fraser & Co. and Geo. A. Trenholm &
129 Son, which were consolidated into this account. Those four accounts were entitled, John Fraser & Co., in liquidation; Jno. E. Phillips, assignee; Geo. A. Trenholm and J. T. Welsman, collateral account, and G. A. Trenholm ⅘ and Jas. T. Welsman, ⅕ account. The items were all taken out and they are all stated in detail. These are copies from the original entries; everything will appear in this account which relates to those several accounts. Then I had this account divided into different columns; the debit side is contained in two columns, one representing all payments made on account of the B and C bonds and the interest, and the other account representing all the amounts paid out that did not appear to be directly paid on the B and C bonds; that is, that were not so stated in the original entry. On the credit side I had all the receipts from collateral put into one column, and the receipts from all other sources put into another column.

By the MASTER:

Q. Outside of these pledged collaterals there were other assets of John Fraser & Co. that were not pledged?

A. Oh, yes.

Q. What were they?

A. They were amounts due John Fraser & Co., book accounts; current rents from the real estate of the firm which was mortgaged to secure the A bonds.

Q. The rents that were collected awhile by you?

A. By Mr. Phillips.

Q. So that embraces two accounts?

A. This embraces all the transactions that I have been able to find

a record of between my father and anybody connected with the estate of John Fraser & Co.

Q. You have divided it to show the pledged collaterals, and to give a general statement of the accounts not pledged?

A. No, sir; I have divided it so that everything shall appear prima facie from the entries—exact copies of the original. Everything according to these entries paid on account of the B and C bonds is placed in its appropriate column.

130 Q. There are two accounts, the collateral and the general account?

A. Yes, sir; in the account of my father's estate, the amount said to have been received from the collaterals is greater than the amount put down in the tabulated statement. The amount in the tabulated statement is $395,232, and the amount in statement number 2 is $423,162.16. The difference I am not able to explain; we have found about $4,000 clerical error in this, and the residue I suppose to be interest and coupons on dividends collected on these securities up to the time of their realization. But it is a difference on the right side, as far as the account is concerned, because my father charges himself with more than the tabulated statement of the collaterals required him to account for.

By Mr. DeSaussure:

Q. The first item of amounts paid for B and C bonds is May 24, 1870. The item is, "This amount applied in part payment, principal and interest, 'B' bonds, series 1, payable 1st January, 1870, as per collateral account, $40,000." Were those amounts absolutely paid, or were those bonds bought?

A. I shall have to refer to the orignal entry.

By Mr. Simonton:

Q. If it should appear by your investigation that it was a purchase of "B" bonds at a discount, would that account show that Mr. G. A. Trenholm had obtained an advantage by reason of such purchase?

A. It would show that the bonds were charged in the account a precisely what was paid for them.

Q. (By the same.) Mr. Welsman would not be charged with the full value of these bonds?

A. Not of any bonds taken up at a discount. I know that is so, because I remember my father saying that he had done that even in cases where he had advanced the money himself, when there was no money in

131 hand from collateral account, and when Mr. Welsman was not able to unite with him in providing money for the purchase.

Q. The balance of $108,454, which is the excess of the "B" bonds purchased over the amounts realized from the collaterals; have any funds been realized from Fraser, Trenholm & Co. to meet the "C" bonds; and, if so, how much?

A. There have been several amounts; I cannot give you the exact figures, except by reference to the books.

Q. Can you approximate to it?

A. No; I cannot undertake to say.

By the Master:

Q. Is that account in every respect correct, or are there any changes which subsequent reflection has induced you to make?

A. I wish to say, in explanation of this, that my attention was called in conference with Gen. DeSaussure to this point: that the account as made out and presented—that is, separating it into two columns, would indicate that the amount received from the collaterals and the amount paid out on the B and C bonds were not very widely different; whereas the amount received from other sources and the amount paid out on other accounts left a very large deficit. I was therefore led to scrutinize those entries which were put down as payments on general accounts, and I find in a great many instances those payments should be charged against the proceeds of the collaterals, because they were payments made for the purpose of redeeming the collaterals that were pledged, and the proceeds of those collaterals afterwards came into the column of receipts from collaterals. In the short time that has elapsed since that conference this list has been made up. (Producing list.) Very large amounts were paid to the Leather Manufacturers' Bank at various times. There were some large payments to Messrs. Davidson & Mathewssen, in Augusta, in settlement of a claim they had, for which B, C, & A bonds were obtained, the "A" bonds being afterwards sold and the proceeds credited amongst the receipts in the collateral account.

132 Q. There was a dispute between John Fraser & Co. and Mathewssen.

A. Mathewssen held some notes, or something of that sort, and Judge Magrath adjusted the claim for a certain sum in money, which was paid.

Q. Out of the collaterals?

A. There were no collaterals at that time; it was a mere charge. The collaterals were there, but there was no money realized. My father and Mr. Welsman constantly supplied money to meet these things that were afterwards chargeable to the proceeds of the collaterals. These claims of Davidson & Mathewssen were purchased and the bonds were afterwards obtained. All those amounts I find charged as payments on the general account.

Q. That was done with Mr. Welsman's assent?

A. So I understand; I am now speaking of a thing that occurred ten or eleven years ago; I know the whole thing was done in general concurrence. There were a great many items of that sort, which I found aggregated $293,946.51, which, if this account is correct, should be transferred from payments on the general account to payments properly chargeable against the proceeds of the collaterals. I am not prepared to say this account is correct; but if it is correct, then $293,946.51, of what appears here in the columns as payments on the general account, should be transferred to the column of payments out of the proceeds of collaterals.

Q. Reducing to that extent the amount of proceeds applicable to the B and C bonds?

A. Yes, sir.

Q. And making the payments out of the general fund?

A. Yes, sir.

The master then asked if the case for the plaintiffs was closed, and Messrs. Hayne, Simonton, Buist, and Smith replied in the affirmative.

On motion of Mr. Simonton, with the assent of all the counsel present, it was ordered the references be closed on the first of November, proximo, and that counsel who were not present be notified to that effect.

The reference then adjourned.

133 MONDAY, *Nov.* 4, 1878.

Reference resumed before Special Master Sam'l Lord, jr. Present, Messrs. Magrath, Smith, W. G. DeSaussure, H. A. DeSaussure, Buist, Young, and Simonton.

Testimony of Col. Wm. Trenholm continued.

Examination by Gen'l DESAUSSURE on behalf of executors of Capt. James Welsman:

Q. Has Mr. Jas. T. Welsman, or his estate, ever paid $310,000.00 for the redemption of the "B" bonds?

A. No, sir.

By Mr. YOUNG:

Q. Were all the bonds that are out as collaterals reissued; or, if not, designate those that are not?

A. Some bonds were held over by the parties who originally received them, taking notes for the amounts, so as to have the bonds paid up by deferred payments, and those notes served merely as a current memorandum of the payments, the bonds being left in the hands of the original holder until all the payments should be made.

Q. Who held bonds in that way?

A. The Peoples' National Bank holds over $40,000.00 of "B" bonds, and I think $4,500 of "C" bonds, payments upon which have been made, leaving a balance still due of $11,000.00, with interest from some time last March.

Q. Those are the only ones held in the shape of collaterals?

A. Messrs. Chas. T. Lowndes & Co. hold some.

Q. Can you designate how many?

A. I cannot state; I am referring now to the notes given by my father during his lifetime; the bonds of the First National Bank are not held upon his notes; they are original bonds, not held as collateral; but I cannot undertake at this time to give an exhaustive account of all the bonds.

Q. Bonds of the Carolina Savings Bank; were they originally issued by Messrs. Robb & Lowndes to that bank?

A. I happen to know the history of that batch; they were held by various parties who received them from Robb & Lowndes, who were

134 very anxious to have the payments made on them; my father had paid up from time to time on them until the amount due was $26,000.00, and as the bonds were held for a long time he went to Mr. Williams and asked him whether he would make a loan of $26,000.00 to enable him to take up these bonds, and he would put them in Mr. William's hands as a batch; the money was paid by Mr. Williams from time to time, Mr. Philips taking the money and retiring the notes and delivering the bonds to Mr. Williams; when it was done all was consolidated into one note; but those bonds stand in the same position as those of the Peoples' National Bank.

Q. Bonds of the First National Bank of Charleston?

A. I am unable to give the history of those bonds, those held by the South Carolina Loan and Trust Company, the Home Insurance Company, and the Bank of Charleston.

Q. Bonds of Mrs. Moffett?

A. I am under the impression that those bonds are in the same position

as those held by the Carolina Savings Bank; $4,000.00 held by the receiver, $2,000.00 was paid on them, and $2,000.00 more was borrowed from Mrs. Moffett to be paid to the original holders, and she held the bonds.

Q. Wm. B. Smith & Co.?

A. I am not prepared to make a statement of those bonds.

Q. Geo. A. Trenholm & Son, in liquidation?

A. Those bonds were not issued to Geo. A. Trenholm & Son; but they were taken by them from parties to whom they were issued.

Q. That is, you bought them up?

A. Yes; out of the assets of the copartnership.

Q. C. K. Huger, trustee?

A. That was part of an amount of $95,000.00, I think, given to Chancellor Dunkin under an order of the court for fees.

Q. Mrs. Alston?

A. That is the same.

Q. Walker & Trenholm?

A. I am not prepared to state concerning those, nor the bonds of Edward L. Trenholm. All these matters were embodied in the account rendered Mr. Jas. T. Welsman from time to time, certainly down to the time that he endorsed with his own signature a batch of bonds for an amount of which three sevenths represented $59,000.00, which he endorsed, and for which he received credit as $59,000.00 to close his account. It
135 seems to me that that should be accepted as decisive as to all accounts between Mr. Welsman and my father relative to these "B" bonds up to that date, to verify which would involve an amount of clerical labor that I am not prepared to furnish. This paper brought by me to-day took Mr. Philips four or five days, keeping him at work late at night, and requiring frequent recourse to old letter-books in order to trace how money was disbursed through the various channels for the purpose of verifying a conclusion stated in a single line.

Q. What was the date of that arrangement with Mr. Welsman?

A. I have Mr. Welsman's letter acknowledging the receipt of the statement and the evidence of the settlement. In January, 1873, this account was closed. (Witness read copy of final statement referred to.) I submitted that account to him, and he endorsed bonds to that amount, $123,000. That is a statement of the settlement of all the bonds that had been retired up to that time. A great deal of this business was carried on by counsel, and finally was settled in that way.

Q. (By Mr. SIMONTON.) Were the thirty shares of Red Mountain stock a portion transferred to your father by John Fraser & Co.?

A. I think that was what was known as undistributed collaterals of the old firm, and what is credited is the portion Mr. Welsman was entitled to. Some of it belonged to my father, and some to Mr. Edward Trenholm. There were many of those shares held in solids, and the amounts were distributed when the stock was realized.

Q. (By the same.) Were the three-sevenths referred to redeemed by funds obtained from collaterals or the general amounts?

A. I am not prepared to say; Geo. A. Trenholm & Son was a sort of clearing house for all these things; when the collaterals were sold the money was paid to them, and what was over, credited to collateral account;

when money was paid out for "B" bonds it was charged to one of the several accounts of which I have had copies made; from time to time as settlements were made with Mr. Welsman these were all consolidated.

Q. Can the three-sevenths be found in that account?

A. I do not think you can find that or say what particular bonds
136 they were.

Q. It must have happened between August 31st, 1872, and December 31st, 1872?

A. It may have been in such a way as this: Take the case of the Peoples' National Bank, where there was $40,000 being paid up by degrees. Those payments, as they were made, would be charged to that particular account; when a final settlement was made, then that account would be closed and the collateral account charged with the whole body. That was the way in which they were kept in some instances; I do not know if it was so in all.

Examination by Mr. SIMONTON:

Q. Did you have any correspondence or intercourse with Mr. Welsman, as executor, with reference to your accounts, after they were rendered?

A. Yes.

Q. Is that account embraced in these accounts?

A. The account which I rendered him assumed the correctness of all these accounts.

Q. What was that correspondence or conversation?

A. Some notes passed between us, but most of it was done by conversation; before my father's death Mr. Welsman had made him a proposition by letter to take all of his property in settlement of whatever he might owe, for a full discharge, which offer my father accepted, and it was to have been carried out. First of all, Mr. Welsman proposed to pay a certain sum in money for a full discharge, which was accepted, and Mr. Welsman asked for a reasonable time to carry that out; at the expiration of a year he had not paid anything; I then, at my father's request, wrote him asking him to make that settlement; he replied that his efforts to sell his property had been unsuccessful, and that all he could do was to convey the property to my father; the proposition to convey the property as settlement of the account was submitted by me to my father, but owing to his declining health he never was able to give a definite reply. After his death I brought the matter again to the attention of Mr. Welsman, telling him I thought it was of great importance to have the arrangement carried out as an arrangement pending at the time of
137 my father's death, and to make that transfer of his property in order that I might get an order from the probate court, authorizing me to accept that amount of property in settlement of the balance due; because if he should go on and sell his property, and pay in the proceeds piecemeal, that he would then leave a large balance of indebtedness against him from which I would have no power to discharge him, and for which he could get no discharge; but if he would transfer the property I would apply for the authority of the court to accept the transfer in settlement of all accounts between the parties. After some considerable conversation between us, and some letters, he assented, and he wrote me a letter making that proposition. I suggested that the proposition should come from him; I then accepted and asked Judge Magrath

to carry it out; in the course of the negotiation there was some question raised as to whether certain pieces of property were to be included, and whether the discharge of his bond given to my father, for some $30,000, was included, and while those matters were under discussion, the papers being prepared for his signature, and I was prepared to settle those matters decided by Judge Magrath to be equitable and competent for me to do, having every disposition to do all I could for him, and only doubtful of my authority to do so, he died.

Q. (By Mr. YOUNG.) That is in writing?

A. Yes.

Q. Will you furnish the evidence?

A. Yes; I will put them all in at the proper time. The papers are all on record in the probate court, and the order was obtained from the court authorizing me to make that settlement, on the letter of Mr. Welsman to me.

Q. (By Mr. BUIST.) Do you remember the date?

A. In December, 1876, not long before his death.

Q. (By Mr. SIMONTON.) Will the written testimony that you propose to put in, show the balance due on the account?

A. Yes.

Q. (By Mr. YOUNG.) As acknowledged by Mr. Welsman?

A. I think so. The last statement of account made by my father to Mr. Welsman, was in July, 1875. (Witness reads letter to Mr. Welsman, dated July 31st, 1875.) To that letter I do not think there was any reply. The next letter was the one in which he said he had made an effort to raise the money by sale or mortgage and had failed to do so. The correspondence goes on in that line that I have indicated, terminating in December, 1876. But this sum of $348,000 was the account that I used as a basis. I had the interest account made up, added to that, and presented these accounts to him.

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By Mr. YOUNG:

Q. In that account which you made up, were the payments made by Mr. Welsman included?

A. Oh, yes; that had all been settled by his bonds.

Q. There were no payments made by him subsequent to 1873?

A. None that I know of; there is no record on our books of any payments made subsequently; all Mr. Welsman's payments were credited to him individually; his individual account was made out; this balance of $348,000 was jointly due by my father and Mr. Welsman; my father spoke of it as due to him, because it represented an outlay actually made, but of course he had to look to himself for $199,000, and to Mr. Welsman for $149,000.

Q. Were those payments credited by balance struck against Mr. Welsman?

A. The payments made by Mr. Welsman had been accounted for and disposed of, and this statement had nothing to do with those payments; his individual accounts were kept separate from this; it was all previous to this; that was in 1875.

Q. (By Mr. BUIST.) Those bonds are the bonds with the special endorsements on the back?

A. Yes; they settled Mr. Welsman's individual account.

TUESDAY, *November* 5, 1878.

Reference resumed before special master, Sam'l Lord, jr.

Present, Messrs. Magrath, Smith, W. G. DeSaussure, H. A. DeSaussure, Buist, Mitchel, Young, and Simonton.

Judge Magrath introduced in evidence the following letters: November 10, 1873, Geo. A. Trenholm to Jas. T. Welsman; November 25,
138 1873, Jas. T. Welsman to Geo. A. Trenholm; December 6, 1873, Geo. A. Trenholm to Jas. T. Welsman; March 13, 1875, Jas. T. Welsman to Geo. A. Trenholm; March 13, 1875, Geo. A. Trenholm to Jas. T. Welsman; March 13, 1875, Jas. T. Welsman to Geo. A. Trenholm; March 15, 1875, Jas. T. Welsman to Geo. A. Trenholm; July 31, 1875, Geo. A. Trenholm to Jas. T. Welsman; Dec. 29, 1875, Jas. T. Welsman to Geo. A. Trenholm, accompanied by letters of same date from Jas. T. Welsman to Wm. L. Trenholm; Feb. 7, 1876, Wm. L. Trenholm to Jas. T. Welsman; March 6, 1876, March 7, 1876, Jas. T. Welsman to Wm. L. Trenholm; May 17, 1876, Wm. L. Trenholm to Jas. T. Welsman; May 17, 1876, Jas. T. Welsman to Wm. L. Trenholm; January 23, 1877, Wm. L. Trenholm to Jas. T. Welsman; January 26, 1877, Jas. T. Welsman to Wm. L. Trenholm.

The following letters were put in evidence by Mr. Young: April 17, 1877, Wm. L. Trenholm to Jas. T. Welsman; April 20, 1877, Jas. T. Welsman to Wm. L. Trenholm.

Mr. Magrath put in evidence the petition filed by W. L. Trenholm, executor, in probate court, on the 6th February, 1877, for leave to accept the proposition for the settlement of Mr. Welsman's debt to the estate of Trenholm, made in Mr. Welsman's letter of the 26th January, 1877, and the order of the judge of probate sanctioning the settlement proposed.

139 UNITED STATES OF AMERICA,
District of South Carolina:

In circuit court.

J. L. PHIPPS & CO. ET AL.
vs.
THEO. D. WAGNER, WM. L. TRENHOLM, ET AL.

Report of S. Lord, jr., special master.

To the honorable the judges of the said court:

This case was referred to me on the 6th May, 1878, by the following order:

"It is ordered that Samuel Lord, jr., esq., be, and he is hereby, appointed special master in this case, with direction by public advertisement in such papers as he shall think proper for the purpose of giving notice to the parties interested, to call before him, at such time and place as he shall designate, all persons holding the bonds of T. D. Wagner and W. L. Trenholm, guaranteed by George A. Trenholm and James T. Welsman, whether known as B or C bonds, to make proof of such bonds before him; and he do further inquire into and report on all the issues of law and facts involved in the pleadings, more especially the nature, priority, and order of the liens securing such bonds, with leave to report any special matter.

"It is further ordered, that Wm. L. Trenholm, executor of Geo. A. Trenholm, and W. G. DeSaussure, R. N. Gourdin, executors, and Emma J. Welsman, executrix of James T. Welsman, account before the said special master for their administration of the estate of their respective testator, as the same has come into their custody, care, or possession.

"It is further ordered, that the said special master do report his
140 conclusions of law and fact, as the same may be presented to him, and that with such report he do file all testimony that may be brought before him."

I respectfully report that, in pursuance of this order, I have held numerous references, which have been attended by the solicitors of the parties, plaintiff and defendant, and also by the solicitors of the holders of the bonds referred to in the order, who have proved their bonds before me, and have taken the testimony; a printed copy of which is herewith filed.

The facts out of which these proceedings have sprung are these: In 1867 the house of John Fraser & Co., which did business in the city of Charleston, and the house of Fraser, Trenholm & Co., which did business in the city of Liverpool, failed. For the settlement with their creditors of the liabilities of these firms, Theodore D. Wagner and Wm. L. Trenholm, two of the copartners, on the 25th of November, 1867, entered into and executed a memorandum of agreement the third article of which provided that Theodore D. Wagner and Wm. L. Trenholm should execute bonds for the aggregate sum of $710,000, secured by a personal guarantee and endorsement, to be approved by James Robb and Charles T. Lowndes, who, in the second article of the agreement, had been named as trustees for the creditors.

In pursuance of this agreement, Theo. D. Wagner and Wm. L. Trenholm jointly and severally executed their bonds, bearing date the 1st of January, 1868, to James Robb and Charles T. Lowndes, trustees, conditioned for the payment of various amounts, which aggregated the sum of $710,000.

These bonds were divided into four series: the first series was conditioned for the payment of $177,500, on the 1st of January, 1870; the second for the payment of a like amount on the 1st of January, 1871; the third for the payment of a like amount on the 1st January, 1872; and the fourth for the payment of a like amount on the 1st January, 1873. All of these bonds bore interest from the 1st January, 1868, at the rate of six per cent. per annum, payable on 1st January, 1870, and thereafter annually on the 1st January in each year.

Upon all and each of these bonds George A. Trenholm and
141 James T. Welsman endorsed a joint and several guarantee under their hands and seals, and thereby bound themselves for the payment of the same when they became due, together with the interest which might accrue thereon. These bonds were designated as "B" bonds to distinguish them from other bonds executed at the same time by Wm. L. Trenholm and Theo D. Wagner, and secured by a mortgage or assignment of real estate, and designated as "A" bonds.

On the 16th of November, 1868, a supplemental agreement was made between Fraser, Trenholm & Co. and John Fraser & Co., and certain of their creditors, by the second article of which it was provided, that the joint obligation of George A. Trenholm and James T. Welsman should be

given to the creditors to make good an unexpected deficiency in the assets of the firm of Fraser, Trenholm & Co., applicable to the payment of the creditors in England. The bonds thus issued were designated as "C" bonds and amounted in the aggregate to $101,448.

When the "C" bonds were executed, Wm. L. Trenholm and Theo. D. Wagner delivered to John E. Phillips a large amount of bonds, stocks, and other choses in action, the property of Jno. Fraser & Co., to be managed by him, as their trustee, and to be applied to the payment of the B and C bonds. While Mr. Philips was the custodian of these assets, they were in fact managed under the supervision and direction of Mr. Geo. A. Trenholm, who considered himself responsible for them. (Testimony of Wm. L. Trenholm, folio 70.) His executor has fully accounted before me for these assets, and I file herewith a statement showing—

1st. The collaterals handed to Mr. Phillips.

2d. The collaterals still in the hands of Mr. Phillips.

3d. The collaterals sold and collected.

By reference to this account it will be seen that the amount realized from these collaterals was $395,232. The assets now remaining in the hands of Mr. Phillips, are, according to the testimony of Col. Wm. L. Trenholm, of little or no value.

"At the time of the execution of the guarantees and endorsements of the "B" bonds referred to, it was agreed between Geo. A. Trenholm and James T. Welsman, that as between themselves, Geo. A. Trenholm should
142 be liable on account of the said guarantees to the extent of $400,000, and Jas. T. Welsman to the extent of $310,000, and that for the "C" bonds, Geo. A. Trenholm should be liable for forty of seventy-one parts thereof, and Jas. T. Welsman should be liable for thirty-one of seventy-one parts thereof, and that each should save and keep harmless and indemnified the other from all claim beyond the amount or proportion by each respectively assumed, as hereinbefore stated.

On the third of May, 1869, Trenholm and Welsman entered into articles of agreement, whereby they acknowledged and ratified this verbal understanding, and on the same day, interchangeably executed and delivered to each other the mortgage of the real estate set forth in the bill, printed copies of which I herewith file as Exhibit.

George A. Trenholm died on the 17th November, 1876, leaving a last will and testament, of full force and unrevoked, bearing date 16th September, 1869, whereof he appointed his wife, Anna Helen Trenholm, executrix, and his son, Wm. L. Trenholm, executor. This will has been duly proved in the court of probate for Charleston County. Wm. L. Trenholm has qualified thereon as executor; Anna Helen Trenholm has not qualified. By this will Mr. Trenholm devised and bequeathed all his estate, real and personal, which should remain after payment of his debts, to his wife, the said Anna Helen Trenholm. The heirs at law of the said Geo. A. Trenholm are correctly set forth in the bill of complaint, except that there is a verbal error in the bill as to the name of his deceased daughter, Mrs. Morgan, whose name was Anna Helen, and not Emily Pierre.

James T. Welsman died on the 7th July, 1877, leaving of full force his last will, whereof he appointed Wilmot G. DeSaussure and Robert N. Gourdin executors, and Emma S. Welsman executrix, all of whom have qualified thereon. By this will Mr. Welsman, after sundry specific lega-

cies, gave and devised all the rest and residue of his estate to Caroline Napier Welsman, his only living child.

Theo. D. Wagner and Wm. L. Trenholm are both insolvent. The personal estate of James T. Welsman is of little or no value, and his real estate not embraced in the mortgage to Mr. Trenholm, does not exceed in value $8,000 or $10,000.

143 According to the testimony of his executor, the personal property of Geo. A. Trenholm's estate cannot be estimated at more than $25,000 or $30,000, and his real estate not embraced in the mortgage to Welsman does not exceed $20,000.

Of the "C" bonds, the entire issue has either been retired or provided for. "B" bonds remain outstanding to the amount of $680,145, a part of which belong absolutely to the present holders, and a part are held as collateral security. The claims against these bonds, according to the statement furnished to me by Mr. Trenholm, is $464,846, exclusive of interest.

The payments made on account of B and C bonds by Mr. Geo. A. Trenholm, or by Geo. A. Trenholm & Son, including interest thereon, amount to	$531,616 61
The receipts from the collaterals placed in the hands of Mr. Phillips amount to	$423,162 16
The excess of payments over receipts from collaterals is	$108,454 45

Which latter amount has been paid by Mr. Trenholm out of his individual means.

The amount due upon the "B" bonds now outstanding is, according to the testimony of Mr. W. L. Trenholm, exclusive of interest	$464,846
Add to this amount the payments made by Mr. Trenholm.	108,454
And we have, as the amount to be contributed by his sureties	$573,300
Of this amount the estate of Mr. Trenholm is liable for	$322,986
Less amount paid	108,454
Leaving due by that estate	$214,532
The estate of Welsman is liable for	$250,314

Immediately after my appointment as special master in this case, I advertised, in pursuance of the order of court, for the holders of B and C bonds to produce and prove their bonds before me.

144 The following is a statement of the bonds so produced and proved, exclusive of interest:

"B" bonds proved by original holders	$178,888 89
"B" bonds proved by persons holding them as collateral security for notes amounting in the aggregate to $, exclusive of interest	457,501 97
Making the total amount of "B" bonds produced and proved	$636,390 86

A more detailed statement of these bonds will be found hereto annexed, and marked Exhibit.

On the 19th of June, 1869, Christopher F. Hampton recovered judgments in this court against John Fraser & Co., and George A. Trenholm, each for the sum of $109,043.25.

On the 13th June, 1871, George A. Trenholm mortgaged to Jas. T. Welsman, executor of Jas. Welsman, to secure the payment of his bond of the same date, conditioned for the payment of $16,480, in five equal annual instalments, the first to be paid on January 1st, 1873, three undivided fifth parts of all that piece, parcel, or lot of land situate on the northwest corner of Meeting and Hasel streets, in the city of Charleston, whereon stands the Pavilion Hotel; which lot was also embraced in the mortgage from Geo. A. Trenholm to Jas. T. Welsman.

In January, 1873, Mr. Trenholm rendered to Mr. Welsman a statement showing that up to that time he had taken up "B" bonds to the amount of $125,766.

On each of the "B" bonds thus taken up, Mr. Welsman placed the following endorsement:

"The proportion of the within bond for which the within bound James T. Welsman is liable; that is to say, thirty-one of the seventy-one parts thereof, have been paid by George A Trenholm. For that sum, with interest, James T. Welsman is indebted to George A. Trenholm, and the mortgage from James T. Welsman to George A. Trenholm, bearing date May 3d, A. D. 1869, and recorded in the mesne conveyance office, Charleston County, in Book H., No. 15, page 571, is acknowledged by James T. Welsman, to be security for the same, to the said George A. Trenholm, or his assigns.

(Signed) "J. T. WELSMAN."

145 In his letter of the 10th November, 1873, Mr. Trenholm notifies Mr. Welsman that, since the above statement, he had further redeemed, partly in cash and partly by the issue of notes, $113,992.12 of said bonds, Mr. Welsman's share of which was $48,852, making together with the previous sum $102,752.

In a subsequent letter, of March 13th, 1875, Mr. Trenholm, replying to one from Mr. Welsman of the same day, states that the amount then due him by John Fraser & Co. could not be less than $200,000, and proposes to take from Mr. Welsman $66,000 in full of all demands against him, $50,000 in cash and $16,000 in his (G. A. Trenholm's) bond, held by James T. Welsman, as executor of James Welsman.

This offer with some modifications was accepted, but, in consequence of Mr. Welsman's inability to raise the cash, the proposed settlement was never carried into effect.

After the death of Mr. George A. Trenholm, the negotiations upon this subject were resumed by his executor. In his letter of 25th January, 1877, to the executor, Mr. Welsman says: "While I admit the indebtedness, I must also say that there is but one mode in which I can ever expect to discharge my portion of those obligations. If, as the executor of the late Mr. Trenholm, you will agree to take all my property, of which I send you a schedule, and which was appropriated to me as a partner of John Fraser & Co., and discharge me from liability on account of these

obligations, I will at once make transfer of the same to you, or in such manner as you will direct."

This offer was accepted by Mr. Trenholm's executor, proceedings were instituted to obtain the approval of the probate court, and an order was made by the judge confirming what had been done. Mr. Trenholm was placed in possession of the property; but, some differences as to matters of detail having arisen, delay was thereby occasioned, and in July, 1877, Mr. Welsman died without having executed the proposed conveyance.

The bill in this case has been filed by the plaintiff on behalf of himself and all other holders of the "B" bonds, to obtain a foreclosure of the
146 mortgages executed by Welsman and Trenholm. It is framed upon the theory that the mortgages were intended to secure payment of these bonds, and that the bonds became a lien thereby upon the mortgaged premises to the extent of the amounts due thereon. This claim cannot, in my judgment, be sustained. After a careful examination of the mortgages and the agreement which they secure, I can find nothing to warrant the conclusion that they were executed for the purpose of securing the bonds, or conferring a distinct and independent lien on the holders thereof.

The intent of these instruments is to pledge the real estate mentioned in the mortgages for the performance of the covenants contained in the agreement of the same date, and to indemnify each of the covenantors against any breach of the covenants on the part of the other.

As the court cannot consider the instruments as giving a lien beyond this intent, it follows that the bondholders have no lien of their own; the most that they can claim is to be subrogated to the rights of their debtors, and to assert a quasi lien by administering the equities between Welsman and Trenholm. This equity of the creditors rests upon the principle first announced in Mause vs. Harrison, 1 Eq. Cases Abr., 93, in which it was held that a bond creditor shall have, in a court of equity, all counter bonds or collateral securities given by the principal to the surety. This was followed in Wright vs. Morley, 11 Vesey, 22, and in ex-parte Waring, 19 Vesey, 345, where it was laid down by Lord Eldon that securities given to a banker to indemnify him against certain acceptances enure to the benefit of the holders of the acceptances, not directly, but through the equity of the acceptor or those claiming through him to have these securities applied in discharge of the acceptance. The same doctrine has been recognized repeatedly in all the courts in England and in this country.

The form in which the question has usually come up is upon the claim for securities given by the principal debtor to his surety or to his creditor.

In the present case the security was not given by the principal debtor, but by the cosurety, but this circumstance is not sufficient to take
147 the case out of the rule. The right of the creditor to lay hold, by proceedings in equity, of collateral securities given by the principal debtor to the security, is founded upon the equitable principle of subrogation, and such right is conceded to the creditor for the avoidance of circuity of action. This equity is quite as strong in favor of a surety (when the principal is insolvent) against his cosurety. The present case falls clearly within the reason of the rule. As towards the holders of the bonds, Welsman and Trenholm are liable each for the entire debt; as between each other, under their agreement, Welsman is liable for $\frac{3}{7}$, and Trenholm $\frac{4}{7}$. To prevent either of them from being first harassed for the

entire debt, and then turning him round to seek indemnity through the mortgage given by his coguarantor, equity will permit the creditors to proceed in the first instance against the mortgaged property, and to enforce it to the same extent that the mortgagee could have enforced it had he been compelled to pay the entire debt.

It is urged by the executor of James Welsman, who holds a junior mortgage upon a part of the property embraced in the Trenholm mortgage, and by the administration of Christopher Hampton, who holds a junior judgment, which binds all the property of both Welsman and Trenholm, that the object of these mortgages was simply to indemnify Welsman and Trenholm from overpayment, and that inasmuch as neither of them has, in fact, overpaid his stipulated proportion of the bonds, neither they nor the creditors, who claim through them, have a right to enforce the mortgages. This is claimed to be specially the case in reference to the Trenholm mortgage—Welsman having failed in his life-time to contribute any considerable amount to the payment of the bonds, and it being reasonably certain that the entire assets of his estate will, even under the most favorable circumstances, fail to pay his proportion.

This contention appears to me to be based upon a misapprehension of the scope and intent of these instruments. That Trenholm and Welsman did not regard these mortgages as having been given simply for the purpose of indemnity, is evident from the endorsement made by Welsman in January, 1873, upon the bonds then paid by Mr. Trenholm.

148 This endorsement clearly recognizes the Welsman mortgage as a security in the hands of Trenholm and his assigns, for Welsman's proportion of the money, so advanced by Trenholm, to pay these bonds, though the amount fell short of $400,000.

The parties having themselves given a practical construction to the contract, that construction will be enforced.

Nor is there anything in the language employed in the mortgages to sustain the construction contended for. They are conditioned not for the indemnity of Welsman and Trenholm, but for "the performance of the covenants, agreement, and understanding contained in the memorandum of agreement," bearing even date with the mortgages. What are those covenants? "That Trenholm should be liable for the full discharge of $400,000, and Welsman for the full discharge of $310,000 of the guaranteed bonds, and that they should indemnify each other against the payment of more than the amounts and proportion thus agreed upon." The object contemplated was obviously not simply indemnity. The mortgages were intended as a security for the payment by each of the guarantors of the amount which he had assumed. Until this was done, these mortgages constituted liens on the mortgaged property, and it was not in the power of either of the guarantors, without the consent of the other, to create a junior lien which could take precedence of them.

It is a well established rule, however, that where creditors claim the benefit of a mortgage through the equities of a mortgagee, they can claim only what the mortgagee, to whose rights they are subrogated, could have claimed.

In this case, the mortgage of Trenholm, as we have seen, was intended to stand as a security to Welsman only for that proportion of the bonds which Trenholm had assumed to pay, and to this extent only can it be en-

forced by the bondholders. Assuming, for the purpose of illustration, that the amount which the sureties have to pay is $573,300, as I have stated in a previous part of this report, and that the proportion for which the estate of Trenholm is still liable is $214,532, that sum will constitute the limit to which the bondholders can charge his estate under the mortgage. Should the property embraced in his mortgage realize more
149 than that sum, the surplus must go to the junior encumbrancers, and not to the bondholders. As to any balance which may be due to them, and which they fail to realize out of the estate of Welsman, they will stand upon the footing of unsecured creditors of the estate. This is also true of the Welsman mortgage.

Both of the principal debtors are in bankruptcy. The liability of the guarantors has become absolute. Their estates are not in a condition to make payment of the bonds.

We have, then, the precise condition of things which was held by Lord Elden, in ex-parte Waring, to entitle the creditors to enforce the security held by their debtor.

I therefore recommend that the property mentioned in the mortgages be sold, at an early day, and the proceeds applied to the payment of the bondholders to the extent that I have indicated.

It is further claimed by the junior lien creditors that, as to some of the bonds proved, Mr. Welsman has been discharged from liability in consequence of the holders having given time to Mr. Trenholm, by taking his note, payable at a future day, and that certain other of said bonds, which were taken up by Trenholm, and afterwards pledged by him, are not entitled to the benefit of his mortgage to Welsman.

I ask leave to make the question thus raised the subject of a future report.

Respectfully submitted.

S. LORD, JR.,
Special Master.

150 EXHIBIT L.—*Schedule of "B" bonds produced and proved.*

Original holders.

	Face value.
First National Bank	$9,600 00
Buist & Buist, attorneys of Beale	1,484 00
Maitland, Phelps & Co	23,600 00
Q. Q. Quigley, president	5,800 00
Henry W. Wiggins	3,000 00
Sarah S. Benedict	2,000 00
Sarah S. Benedict, Fred. Cromwell, Sam'l H. Seaman, John H. Clark, John E. Parsons, trustees, Geo. H. B. Cromwell	8,726 82
John George	200 00
Joseph Wild & Co	1,000 00
T. & W. Earle	5,000 00
Given, Jones & Co	4,500 00
J. J. Stuart & Co	3,500 00
Geo. A. Trenholm & Son, in liquidation	11,936 40

Charleston Gas-Light Co	1,262 17
C. K. Huger, trustee	1,000 00
Mrs. A. W. Alston	4,487 50
Henry Eyre	4,500 00
J. L. Phipps & Co	2,600 00
R. Irvin & Co	400 00
Edward L. Trenholm	35,842 00
Jas. Brown	2,500 00
Taaks & Lichenskin	3,400 00
Winslow, Lanier & Co	3,500 00
Louisiana Nat'l Bank	6,500 00
R. C. Burlage	3,600 00
John Monro & Co	1,700 00
A. Iselin & Co	1,500 00
Walker & Trenholm	25,750 00
Total amount of bonds originally held	$178,888 89

151 Schedule of "B" bonds proved by persons holding them as collateral security for notes, etc.

	Am't of bonds held.	Security for.
Carolina Savings Bank	$104,325 00	$26,000 00
First National Bank	80,850 00	43,240 75
South Carolina Loan & Trust Co	20,000 00	4,993 00
Home Insurance Co	25,000 00	15,000 00
C. T. Lowndes & Co	27,862 89	25,800 00
Bank of Charleston, N. B. A	79,600 00	38,413 00
Mrs. E. W. Moffett	4,000 00	2,000 00
Hampton collaterals (bonds to secure bond of C. F. Hampton)	$28,000 00	$27,428 96
Union Bank of So. Ca	40,814 08	11,000 00
W. B. Smith & Co	30,000 00	16,685 95
Wilmot G. DeSaussure, trustee of Morgan	4,000 00	1,656 52
Wilmot G. DeSaussure, trustee of Hazzard	13,050 00	5,000 00
Total bonds held as collaterals, exclusive of interest	$457,501 97 for	$219,218 18
Total bonds proved		$636,390 86

152 THE UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina:

J. L. PHIPPS ET AL.
against
THEO. D. WAGENER, WM. L. TRENHOLM, ET AL. } In equity.

Report of special master as to Mrs. Trenholm's dower.

To the honorable the judges of the said court:

In my previous report, I disposed of the questions growing out of the

mutual mortgages executed to each other by Geo. A. Trenholm and Jas. T. Welsman.

I now proceed to consider the question raised as to Mrs. Trenholm's right to dower in the property mortgaged, and the amount, if any, to be paid to her.

STATEMENT.

On the 7th February, 1877, Mrs. Anna H. Trenholm filed her petition in the probate court for Charleston County, in which she alleges
153 the death of her husband, George A. Trenholm, on the day of , 1876; that he left in full force his last will and testament, by which, after the payment of all his just debts, he devised and bequeathed to her all his estate, real and personal, and especially provided that nothing in the said will contained should interfere with Mrs. Trenholm's claim of dower; that the said will was admitted to probate on the day of December, 1876, and that W. L. Trenholm alone qualified thereon. Reserving all her rights under the said will, Mrs. Trenholm claims her dower in the real estate of her husband, and prays a writ for the admeasurement of dower, directed to certain persons therein to be named for the purpose.

On the same day a citation issued from said court directed to Wm. L. Trenholm, executor, commanding him, on or before the 17th February, to shew cause why the writ for admeasurement of dower should not issue. On the 8th February, 1877, the said Wm. L. Trenholm, executor, filed his return, in which he admits the death of George A. Trenholm, his will, as set forth in the petition, the probate, and that respondent qualified thereon as executor; that he cannot deny the right of Mrs. Trenholm to dower in the real estate of George A. Trenholm, but that in all matters relating to the same, he submits himself to the direction and decree of the said court.

On the same day (8th February, 1877), Mrs. Anna H. Trenholm, through her attorney, Julian Mitchell, esq., nominated Messrs. Louis D. DeSaussure and Charles R. Brewster as commissioners on her part to admeasure her dower, and Wm. L. Trenholm, executor, through his attorney, the Hon. A. G. Magrath, nominated on his part as commissioners for said purpose, Messrs. Edward Sebring and Samuel C. Black. Whereupon the judge of the said court having appointed Mr. R. M. Marshall as the fifth commissioner, issued his said writ of admeasurement, dated on the 8th February, 1877, directed to the said five named commissioners, and commanding them, within one month after the date thereof, to admeasure and mete out the dower of the said Anna Helen Trenholm, and to put her in full and peaceable possession of one-third part of all the lands of
154 the said George A. Trenholm, deceased, and to return a plat of the same, with their certificate under seal, etc., to the said court; and in case the said commissioners could not fairly and equally divide the said real estate, then commanding them to assess a certain sum of money in lieu of dower, to be paid by W. L. Trenholm, executor of G. A. Trenholm.

The commissioners duly qualified before the judge of probate upon said writ, and on the 6th day of March, 1877, filed their return in the said court, wherein they report that, in their proper persons, they did go to and

upon the lands and premises of the late George A. Trenholm and assessed the same at the values attached to each, respectively, in the schedule attached to the said return, and amounting in the aggregate to $355,885; that the premises cannot be fairly and equally divided so as to admeasure to the said Anna H. Trenholm her dower in the said lands without manifest disadvantage, and therefore, in lieu of dower, they assess the sum of $59,314, to be paid her by William L. Trenholm, executor.

On the 14th of April, 1877, the probate court decreed "that the said assessment be made final and conclusive on all parties interested therein, and be confirmed, and that the said Anna Helen Trenholm do recover the said sum of money above assessed, to be paid to her by the said William L. Trenholm, executor, as aforesaid, of the late George A. Trenholm, and also the sum of $1,040, costs and charges; which said several sums, in the whole, amount to $60,345." Appended to the decree is a statement of the costs and charges decreed by the court, as follows:

Bill of commissioners	$875
Plaintiffs' attorney	95
Defendants' attorney	35
Court, for proceedings	35
	$1,040

On the April, 1877, the probate court decreed that these costs must be paid by the person or persons who claim the property or are in
155 possession of the lands, and that Mrs. Trenholm is to have her dower free of any costs; and by a further decree, dated 10th April, 1877, upon testimony taken, taxed as just and reasonable the above bill of commissioners.

Mrs. Trenholm, who has been made a party to this cause, claims, in her answer, that, under the decree of the said probate court, she has become entitled to receive the said sums so admeasured and decreed to her, from the estate of the said Geo. A. Trenholm; and the said sums so admeasured and decreed are a lien upon the said real estate, prior to all other liens of every nature and kind whatsoever, and she submits that if the said real estate be sold under order of this court, she must be paid the said sums, prior to the payment of all other debts, claims, liens, or incumbrances whatsoever.

The principal point in the case depends upon local law, and is involved in some obscurity. I would gladly follow the doctrine of the courts of the State, if any case had completely decided it. But, unfortunately, the main question involved has not undergone any direct adjudication, and I am left to grapple as I may with the difficulties presented by a new posture of facts, and with very imperfect lights to guide me.

The question turns mainly upon the construction of the provisions of chapter 113 of the general statutes of South Carolina, regulating the allotment of dower by the judge of probate. A review of the law as it stood prior to the adoption of this act is necessary to its proper understanding.

Dower at common law was the right of a woman to have one-third of all the lands and tenements whereof her husband was seized at any time during the coverture, and of which any issue that she might have had, might, by possibility, have been heir, allotted to her for the term of her

natural life. This humane provision of the law was intended for the sure and competent sustenance of the widow, and the better nurture and education of her children.

To the consummation of the title to dower, three things are requisite, viz, marriage, seizure of the husband, and his death. During the husband's life the right is contingent and inchoate. Upon the death
156 of the husband the right to dower becomes consummate, but until assignment she has no estate in the lands, for the law casts the freehold on the heir immediately upon the death of the ancestor. (Cruise's Digest, title 6, Dower, chapter 3, § 1.) Until assignment dower is a mere chose or right in action against the heir or devisee, or other person seized of the land subject to dower. (4 Kent, 61.)

The particular lands to be held in dower must be assigned by the hier to the husband, or his guardian (2 Blackstone, 136.) If this was not done within forty days the widow had her right of action at law by writ of dower against the tenant of the freehold. On recovery at law the sheriff, under the writ of seizure, delivered to the demandant possession of her dower by metes and bounds, if the subject was properly divisible, and the lands be held in severalty. If the property was not divisible, she was dowable in a special manner, as of the third presentation to a church, the third of a toll of a mill, the third sheaf of tithe, and the like. In England, a pecuniary compensation to the widow in lieu of dower was wholly unknown.

"In no other instance," says Ch. Wardlaw, "has our departure from the English practice been so great as in this particular of commuting the share of a dowress or of one entitled to partition, by sale of the premises or assessment into its monied value instead of making specific assignment." (Gibson vs. Marshall, 5th Rich E., 260.)

Writs of dower, like other real actions, required great nicety in their management, and were attended with great delay and expense, and, accordingly, in this State, as early as 1777, an act was passed "for the more easy and expeditious obtaining of the admeasurement of dower to widows of their deceased husbands." (Stat. at Large, iv vol., 385.)

This act, after reciting that "the mode then necessary to be observed in the court of common pleas for obtaining admeasurement of dower or thirds of lands, was attended with many inconveniences by reason of the prolixity of the proceedings and the great delay occasioned thereby," "in order that right and justice might be done to all parties with more expedition and at less expense, provides a summary mode of proceeding for the admeasurement of dower in courts of law."

157 The first section provides that the widow might apply by petition to the judges of the court, praying a writ for the admeasurement of her dower to be directed to certain persons to be appointed for that purpose, and that immediately thereupon the judges should issue a summons to the heir at law of the deceased, if of full age, or to his or her guardian, if a minor, and, in case there should be no guardian, then to the executors or administrators of such deceased person, commanding them within ten days to show cause why the prayer of the petition should not be granted. That, if sufficient cause were not shown, the court should cause a writ of admeasurement of dower to be issued and directed to six persons, three to be nominated by each of the parties, commanding

them to admeasure and mete out to the petitioner and put her in possession of one-third of the lands of her husband; and in case the lands could not be fairly divided, without manifest disadvantage, then to assess a certain sum of money in lieu of dower, to be paid by the heir at law.

The second section of the act provides for the case of the refusal or neglect of the heir to appoint commissioners.

The third section authorizes the commissioners to call to their aid one or more surveyors, and provides that the whole expense of making such admeasurement of dower shall be borne and defrayed out of the "estate of the heir at law."

It is obvious that this act contemplates only the case where land is cast by descent on the heir, and that it was not intended that any one should be bound by the result of the proceeding except the heir at law. The parties to whom the summons is to be directed are the parties upon whom, at common law, the duty devolved of assigning to the widow her dower, to wit, the heir, or if the heir was a minor, his guardian. The only change made in this respect is the provision that in case there should be no guardian, the summons might be directed to the executor or administrator of the deceased. But that the executor or administrator is made a party not as representing the estate of the testator or intestate, but as pro hac vice the guardian of the infant heir is shown conclusively by the fact that the second section of the act directs the money assessed in lieu of
158 dower to be paid by "the heir at law," and the third section provides that the expense of the proceedings shall be defrayed out of the "estate of the heir at law."

It is too plain for argument that the court, under these proceedings, had no right to enter up judgment against any one except the heir at law, and that the judgment bound only those who would have been bound by a judgment at common law in proceedings commenced by writ of dower.

But, while professing to deal only with the remedy, the act, in point of fact, introduced a radical change in the law of dower, by giving to the commissioners the right, in case the land could not be fairly and equally divided without manifest disadvantage, to assess a certain sum of money, to be paid by the heir at law, and to compel the widow to accept this money in lieu of her dower.

This act, as might have been anticipated, was "found by experience to be very defective in many instances," and accordingly, in 1786, it was amended. (IV Stat., 742.)

This last act authorized the summons to be issued to the same persons named in the act of 1777, "or to any other person or persons who might be in possession of the lands." It also authorized a majority of the commissioners, if in their opinion the lands could not be fairly divided, to assess a sum of money, to be paid to the widow in lieu of her dower, by "the heir at law or such other person or persons who may be in possession of the land." It also provides that the expenses of the admeasurement of dower shall be paid by the person or persons who shall claim the property or be in possession of the lands.

It is obvious that the effect of this act was to extend the remedy for the more easy and expeditious admeasurement of dower to cases not embraced in the previous act. Under the act of 1777 the heir was the only person to whom the summons could be directed, or against whom a sum of money

could be assessed. The act did not provide for those cases in which the land, by alienation or otherwise, had passed into the hands of others. Under the act of 1786 a summons in dower lies against any one in possession of land, whether the title is in himself or another (Plant vs.
159 Payne, 2 Bailey, 319); against the tenant for life or in fee, as well as against the person in possession (Kennedy vs. McAliley, 9 Rich., 395); against a tenant for years (Williams vs. Lanneau, 4 Strob., 27); or against a mere trespasser (Bauskett vs Smith, 2 Rich., 164).

As any of these persons may be made parties defendant, the commissioners may, by the express terms of the act, assess a sum of money against any of them, to be paid to the widow in lieu of her dower. The statute does not provide how this assessment shall be enforced. It does not give the court, like the act of 1791 (5 Stat., 164), regulating proceedings in partition, the power to direct a sale of the land, if a sale should appear to the court to be more for the benefit of the parties.

In Bauskett vs. Smith a doubt was intimated by the court, "whether the assessment of the commissioners was the subject of a legal judgment." The practice, however, appears to have been uniform to enter up judgment upon the assessment, as upon the verdict of a jury, and upon such judgment to issue an execution in the usual form.

In Williams vs. Lanneau, 4 Strob., 27, judgment was entered, and execution was issued against a tenant for years; and although the judgment was afterward set aside on other grounds, after a stubbornly contested litigation, the correctness of the proceedings in this respect was not questioned either by the court or by the counsel.

In Bauskett vs. Smith, judgment was entered up against one who was held to be a mere trespasser.

This uniform practice, I think, must be regarded as having settled the law upon the subject.

The next important question to be settled is, what is the nature of this judgment? Does it operate as a specific lien on the land, or is it simply a judgment in personam for a sum of money to be levied generally out of the property of the defendant? The statute does not give a lien to the widow on the land, to secure the payment of the sum so assessed. The act of 1791, already referred to as regulating proceedings in partition, expressly provides that, upon a sale of the land, the property so sold
160 shall stand pledged for the payment of the purchase-money, and it has been held that, by a fair construction, lands were liable also for sums decreed to any of the parties to produce equality of partition. But the act providing for the assessment of dower contains no such provision.

The point under consideration was expressly decided in Bauskett vs. Smith, 2 Rich., 164. In that case the facts were these: Lester Richards conveyed to William Richards a tract of land for the purpose of defeating a judgment which John Bauskett was about to recover. After the death of Lester Richards, his widow instituted proceedings under the act of 1878 to have her dower admeasured. The commissioners, by their return, assessed the value of the demandant's dower in the land in dispute at one hundred and sixty-three dollars. Judgment was entered up against William Richards, and, under it, the land was sold and conveyed by the sheriff to William Richards. The plaintiff in this action derived title through a subsequent

conveyance of the sheriff, under a judgment which he had recovered against Lester Richards. At the trial in the circuit court it was contended that the judgment in dower operated as a specific lien on the land and divested the lien of the plaintiff under the judgment against Lester Richards, so that the sheriff's deed to the plaintiff should be postponed to the sheriff's deed to William Richards, from whom the defendant claimed. The jury were instructed that the judgment in dower operated no specific lien on the land, and bound only William Richards, who was a party to it. From this charge the defendant appealed. The appeal was dismissed.

Judge Butler, in delivering the opinion of the court, says: "The assessment, if it was a subject of a legal judgment, was not made against the owner of the land, but was a sum of money due under the proceedings by the party to the proceedings. It could not operate as a judgment against any one else." * * * * * *

"The judgment in dower, as it is termed, is against Wm. Richards, and, of course, could, by its own purport only, bind his property." * *

"It is a judgment against the goods and chattels and lands
161 of William Richards for the payment of a certain sum due by him. By its very terms it limits the authority of the execution under it, and is confined in its operation to the property of the defendant in it."

If, now, we look into the judgment in the probate court, relied on in this case, to see what has in fact been adjudged, we shall find that the court has proceeded in strict conformity with these views. It confirms the return of the commissioners, and decrees that the defendant do recover the sum of money so to be paid to her by the said Wm. L. Trenholm. It does not direct that it shall be paid out of the assets of the estate of Geo. A. Trenholm, or out the lands charged with the dower, but that it shall be paid by Wm. L. Trenholm. It was clearly, therefore, a judgment under the proceedings against Wm. L. Trenholm individually. It is true that he is styled the executor of George A. Trenholm, but this is mere descriptio personæ.

Every judgment leans for support upon the pleadings. When pleaded in bar, it is necessary to go behind the formal judgment into the pleadings to see what right has been adjudicated.

Applying this rule to the judgment under consideration, we find that the claim set up in the petition is a cause of action which had no existence in the life-time of Geo. A. Trenholm, but which arose after his death, and which the law expressly declares shall be paid by the heir at law or other person or persons in possession of his real estate.

If Wm. L. Trenholm, after the death of his father, had purchased supplies for the estate of his testator, and upon suit brought for the purchase money the court had adjudged that the plaintiff should recover the amount of his claim against Wm. L. Trenholm, it would scarcely be contended that the judgment would bind the estate of his testator, though throughout the pleadings and in the judgment he had been designated as executor. Now, the decree in this case is substantially such a decree as that, if it be examined by the record to which it is annexed. We therefore give full faith and credit to the judgment when we hold that it is a judg-
162 ment against the goods and chattels and lands of Wm. L. Trenholm for the payment of a certain sum of money, and that it binds and concludes the parties to the proceedings and no one else. Quoad her

judgment, Mrs. Trenholm's, stands on the same footing as all other judgment creditors of the defendant.

But it is insisted that proceedings in dower are quasi a real action; that the judgment is necessarilly in rem and that therefore Wm. L. Trenholm, being the heir at law as well as the executor of his father, and being also in possession of the lands, was a competent party through whom the proceedings for admeasurement of dower might be consummated, for the purpose of binding all interested in the lands, whether as devisee, mortgagee, or otherwise. Even had Wm. L. Trenholm been the only distributee of his father this position could not be maintained. This point is expressly ruled in Bauskett vs. Smith. "The act," says the court, "never could have contemplated a case in which proceedings against a naked trespasser would be conclusively binding on the true owner, who was a stranger to the proceedings." But if the judgment against a trespasser did not bind any one who was not a party to the proceedings, neither does a judgment against the heir, for the statute give to a judgment against the trespasser precisely the same effect as a judgment against the heir.

But in my opinion, Wm. L. Trenholm should not have been the sole party defendant to the proceedings in dower. There is no evidence that he was in possession of any of the numerous pieces of property in which dower was claimed. He may have been (though even of this there is no proof) in receipt of the rents and profits, either as executor or as agent of the devisee, but the act of the legislature contemplates an actual pedis possessio, not a mere constructive possession. Nor was he the heir at law of Geo. A. Trenholm. He was only one of the several heirs at law. The heir at law is the person who, after his ancestor's death, when he dies intestate, has the right to all the lands, tenements, and hereditaments which belonged to him or of which he was seized. It is synonymous with "heir." (Bouvier's Law Dictionary, title "heir"). It may be nomen col-
163 lectvium in a statute as well as in a deed or will, and operate in both in the same manner as "heirs" in the plural number. At common law the heir at law was the eldest son, but in South Carolina, except as to estates not within the statute of distributions, the terms heirs and heirs at law, mean distributees or heredes facti under those statutes.

Evans vs. Godbald, 6 Rich. Eq., 26.

"Perhaps a liberal construction of the act of 1786," says Chancellor Harper, "would require that the devisee of the land should be summoned."

McDowell vs. McDowell, Bailey's E., 325.

The heirs at law of Mr. Trenholm were his children and his grandchild, whose names are set forth in the bill, and they, as the parties interested in the estate, and having the right to be heard before the dower was assessed, should have been made parties, unless Mrs. Trenholm elected to accept the devise contained in her husband's will, in which case she alone should have been the party defendant. The executor was only a proper party to represent the infant child of Mrs. Morgan, and then only in case there was no guardian.

If the proceedings in the probate court were designed to bind all parties interested in the land on the principle of a virtual representation, it was

incumbent on the demandant to see that all the persons were brought before the court whom the act pointed out as the proper representatives of the parties and interests to be affected by the decree. This not having been done the judgment is null and void as against all the world, except the parties to the suit.

But it is urged by the creditors that Mrs. Trenholm is estopped from questioning the validity of the proceedings instituted by herself; that by those proceedings her claim has been reduced to a mere money claim; that her right to charge the land is gone, and that her remedy is by enforcing the judgment she holds against Wm. L. Trenholm. It therefore becomes important to consider whether, in proceedgins under the act of 1786, the assessment by the commissioners of a sum of money to be paid to the widow in lieu of dower, extinguishes her claim to the land, irrespective of the payment of the sum so assessed.

164 This point does not appear ever to have been expressly decided. In Stock vs. Parker, 2 McCord, 381, the widow had instituted proceedings to obtain her dower, and the commissioners assessed a sum in lieu of dower, which the administrator paid out of the general funds of the estate, the land being still undisposed of. The payment was objected to upon the ground that the assessment was a charge upon the land itself, and not on the general funds of the estate, and that the payment was a devastavit. Ch. Johnson, delivering the opinion of the court, says: "The right of dower consists of property in the soil, and although the act of the legislature regulating the admeasurement of dower has, under particular circumstances, authorized the substitution or assessment of a sum of money in lieu of it, yet the character of the right is unchanged, and it operates as a charge upon the land itself, and not on the general funds of the estate."

The precise point decided, however, was only that the assessment could not be paid out of the general funds of the estate. Whether it was a charge on the lands or a charge on the heir, was a question not involved in the case.

In Bauskett vs. Smith, Butler, J., speaking for the court, says:

"There might be cases in which the heir or purchaser, being insolvent, could not pay the sum assessed. In such case the widow would have a clear right to fall back on her absolute right in the land, which can neither be defeated by the alienation of the husband, nor by the insolvency of the purchaser."

In that case the sum assessed had been actually paid. What was said by the court upon the point now under consideration was, therefore, merely obiter dictum. It embodies, however, in my opinion, the proper construction of the statute.

The right of dower is a highly favored claim, and will always be sustained, unless in opposition to the declared intention of the legislature, or in such manifest repugnancy to the statute, that the claim to dower and the provisions of the statute cannot stand together. "To such an extent has this claim been favored," says Ch. Dargan, "that courts of jus-

165 tice have been charged with extravagances in sustaining the right of the widow to her dower." Baily vs. Boyce, 4 Strob., 86. At common law, the assignment of land, whereof the widow is not dowable, or of suit issuing out of such land, is no bar to dower, because a right or title to a freehold estate cannot be barred by a collateral satisfaction

Cruise's Digest, title vi, dower, ch. iii, sec. 12. If an assignment and grant of lands be made to a woman for a term of years in recompense of her dower this will not bar her of a dower, because she has not such an estate as if she had been endowed. In some cases she may have a new assignment of dower, as where she is evicted out of the lands assigned to her, she shall be endowed of the third of the remainder. Though the widow's dower may be barred by a jointure, yet her ante-nuptial covenant in a marriage settlement never to claim dower will not have that effect, even though it contain an agreement that it may be pleaded in bar of any action of dower, unless the consideration on which the covenant was founded has been performed.

Cruise's Digest, ibid.

Such was the jealousy with which the common law protected the widow's dower.

If now we turn to the statute law, we shall find that it is pervaded by the same desire to protect the right of dower and to render its assertion cheap and expeditious. As there seems to have been no adequate motive in this case to deviate from this uniform course, we are not to suppose that the legislature intended to compel the widow to accept a judgment against an insolvent heir or trespasser in lieu of her dower unless their meaning is clearly and unequivocally expressed.

No such clear and unequivocal evidence of intention can be found in the act in question. On the contrary, the language employed indicates that it was not the assessment, but the payment of the assessment, which bars the dower. The object of the legislature was manifestly to give to the heir, or other person claiming the land, in cases where a fair and equal partition could not be made, the privilege of disencumbering the title of the right of dower by paying its money value. If this was done
166 the land was discharged from further claim. If the defendant was unwilling to pay, and could not in consequence of his insolvency be forced to do so, the dowress is in my opinion entitled to fall back on her right to have her dower assessed by metes and bounds, just as at common law she might, if evicted out of the lands assigned her, have had new assignment of dower. Under any other view of the act we should have presented to us the startling anomaly of the highest and most favored right known to the law defeated by the very remedy especially provided for its enforcement. I am, therefore, of opinion that, while the claim of Mrs. Trenholm to have the amount of the judgment obtained by her in the probate court paid out of the proceeds of the real estate, sold under the order of this court, cannot be allowed, she is entitled to receive one-sixth of all the proceeds of said sales, unless she elects to retain the judgment which she has recovered against W. L. Trenholm, in which case the assessment must be regarded as paid and the land freed from further claim on her part.

Upon the mortgage to J. T. Welsman there is no renunciation of dower, but upon the mortgage to Jas. T. Welsman, executor, of the three undivided fifths of the Pavilion Hotel, her dower was renounced. This is the only renunciation of dower by her which has been brought to my attention.

Respectfully submitted.

SAMUEL LORD, JR.,
Special Master.

167 And on the day of , A. D. came into court the defendant Christopher F. Hampton, administrator of estate of Frank Hampton, deceased, and filed the following exceptions; which exceptions are in the words and tenor following:

No. 13.

Exceptions.

UNITED STATES OF AMERICA,
South Carolina District:

In the circuit court.

J. L. PHIPPS AND COMPANY ET AL.
vs.
THEODORE D. WAGNER, WM. L. TRENHOLM, ET AL.

Exceptions of Christopher F. Hampton, administrator of estate of Frank Hampton, deceased, to the report of Sam'l Lord, jr., esquire, special master.

Defendant above named excepts to so much of the report:

First. As admits in evidence proof of a parol agreement outside of the recitals and terms of the mortgages from George A. Trenholm to James T. Welsman, and from James T. Welsman to George A. Trenholm, on the ground that the express terms of the said mortgages cannot be enlarged or varied by proof of such agreement.

Second. As finds that said mortgages are conditioned not for the indemnity of Welsman and Trenholm each to the other, but "for the performance of the covenants and agreements and understanding contained in the memorandum of agreement bearing even date with the mortgages,"
168 and "that Trenholm should be liable for the full discharge of $400,000 and Welsman for the full discharge of $310,000 of the guaranteed bonds."

Third. As admits in evidence the endorsement by Welsman, in January, 1873, upon the bonds paid by Trenholm, and upon such evidence finds, that such "endorsement clearly recognizes the Welsman mortgage as security in the hands of Trenholm and his assigns for Welsman's proportion of the money advanced by Trenholm to pay these bonds, though the amount fell short of $400,000; because (1) such endorsement, if of any effect in giving Trenholm a claim upon Welsman's property, could not enlarge the previous claim of Trenholm under the mortgage of Welsman, nor give such claim of precedence over a previous judgment creditor of Welsman; because (2) such endorsement, in 1873, is proof only of Welsman's then acknowledgment, from which the intention of the parties to the Welsman-Trenholm mortgage of 1869 cannot properly be inferred, and as proof of intention cannot be resorted to in construing the express terms of the deed; because (3) the acknowledgment of Welsman by his said endorsement is the admission of his liability as cognarantor with Trenholm to contribute to the payment of the bonds by Trenholm, and is nothing more, and that the special master erred in holding that by

such endorsement, in 1873, four years after the date of the mortgages, the parties to the mortgage have given a practical construction to the mortgages by which the court is governed.

Fourth. To so much of the report as finds that the mortgages were intended as a security to the creditors for the payment by each of the guarantors of the amounts, which, as between themselves, they had assumed to each other.

Fifth. To so much of the report as holds that the bondholders, who sue in this case, can charge the property of George A. Trenholm under his mortgage to James T. Welsman, with the sum of $214,532. Because the report correctly holds that the creditors can only claim through Welsman's equity for contribution against Trenholm, and upon the undisputed facts of the case Welsman has no such equity, inasmuch as he has wholly failed to pay his proportion of the bonds guaranteed; and his estate being insolvent, he can never pay his share, viz, the $310,000 assumed by him, and he, if alive, could never have such equity.

169 Sixth. That the lien of the Hampton judgment for an antecedent debt was perfect in 1869, binding, from and after the date of its rendition, in June, 1869, all the property and rights of Trenholm and of Welsman, and cannot at law or in equity be postponed to the claim of Trenholm against Welsman, or of Welsman against Trenholm, arising out of any equity between them.

That assuming that the mortgage of Trenholm to Welsman could bind the land in equity against the claim of an antecedent creditor of both the mortgagor and mortgagee (whose claim was in suit and stood for trial in May, 1869, when the mortgages inter sese were executed), so as to subject the land of Trenholm to the payment of contributions and indemnity to become due by Trenholm to Welsman in the future, still such charge in favor of Welsman upon the property of Trenholm was an interest or estate of Welsman the moment it was created, and as such was bound by the lien of the Hampton judgment from the beginning.

Seventh. That if Trenholm, by virtue of the mortgage of Welsman to him, acquired a right to charge Welsman's land for contribution, such right was an interest or estate of Trenholm, which became bound from 19th June, 1869, by the Hampton. Judgment vs. Trenholm.

That being so bound, Trenholm could not, if he had any claim for contribution at all, subject the land of Welsman to the payment of his indemnity without first discharging the debt of Welsman to Hampton under the judgment. So if the mortgage of Trenholm to Welsman gave Welsman a legal or equitable interest in or claim upon Trenholm's land the creditor of Welsman before he could by subrogation or substitution take the place of Welsman as against Trenholm's estate, must first do what Welsman would have to do, pay off the incumbrance at law and discharge the superior claim in equity of the antecedent judgment creditor of both himself and Trenholm before he could avail himself of the security.

Eighth. That, if at the date of Trenholm's death Welsman had any equity for contribution or claim for indemnity against Trenholm, such equity, according to the law of South Carolina, would be postponed in the order of payment of the debts of Trenholm's estate to the claim of a judgment creditor of Trenholm. So, if at the date of Welsman's death

Trenholm had an equity for contribution or claim for indemnity
170 against Welsman, such equity, according to the law of South Carolina, would be postponed in order of payment of the debts of Trenholm's estate to the claim of the judgment creditors of Trenholm.

Ninth. That the lien of the Hampton judgment is a claim upon the lands of Trenholm, and of Welsman anterior to the claim of either under the mortgages of the other, and adverse to the title of the mortgagors, and cannot be tried in this foreclosure suit.

SIMONTON & BARKER,
Counsel for C. F. Hampton, Administrator.

171 And on the 3rd day of January, 1879, came into court the defendants Maria C. Otis and Emma S. Welsman, executrixes of James Welsman, by their solicitors DeSaussure & Son, and filed the following exceptions; which exceptions are in the words and tenor following:

No. 14.

Exceptions.

UNITED STATES OF AMERICA,
Fourth Circuit, South Carolina District:

J. L. PHIPPS
vs.
WILLIAM L. TRENHOLM, EXEC'T'R, GEORGE A. Trenholm, Wilmot G. DeSaussure, Robert N. Gourdin & Emma S. Welsman, executors of James Welsman and others. } In equity.

Exceptions taken by the defendants, Maria C. Otis and Emma S. Welsman, executrixes of James Welsman, to the report made herein by Samuel Lord, jr., esq., special master of this court, to whom this cause was referred by an order of the court, made and entered on the 6th day of May, 1878, which report bears date the day of and was filed in the office of the clerk of the circuit court, South Carolina district, at Charleston, on the day of December, 1878.

FIRST EXCEPTION.—For that the said master in his said report, states "The bill in this case has been filed by the plaintiff on behalf of himself and all other holders of "B" bonds to obtain a foreclosure of the mortgages executed by Welsman and Trenholm. It is framed upon the theory that the mortgages were intended to secure payment of these bonds, and that the bonds became a lien thereby upon the mortgaged premises to the extent of the amounts due thereon. This claim cannot, in my judgment, be sustained. After a careful examination of the mortgages and the agreement which they secure, I can find nothing to warrant the conclusion that they were executed for the purpose of securing the bonds or conferring a distinct and independent lien on the holders thereof. The intent of these instruments is to pledge the real estate mentioned in the mortgages for the performance of the covenants contained in the agreement of the same date,

and to indemnify each of the covenantors against any breach of the covenants on the part of the other. As the court cannot consider the instruments as giving a lien beyond this intent, it follows that the bondholders have
172 no lien of their own; the most that they can claim is to be subrogated to the rights of their debtors, and to assert a quasi lien by administering the equities between Welsman and Trenholm. This equity of the creditors rests upon the principle first announced in Mause and Harrison, 1 Eq. Cases, Abr., 93, in which it was held that a bond creditor shall have, in a court of equity, all counter bonds or collateral securities given by the principal to the surety. This was followed in Wright vs. Morley, 11 Ves., 22, and ex parte Waring, 19 Ves., 345, where it was laid down by Lord Elden that securities given to a banker to indemnify him against certain acceptances enure to the benefit of the holders of the acceptances, not directly, but through the equity of the acceptor or those claiming through him to have these securities applied in discharge of the acceptance. The same doctrine has been recognized repeatedly in all the courts of England and in this country. The form in which the question has usually come up is upon the claim for securities given by the principal debtor to his surety or to his creditor. In the present case, the security was not given by the principal debtor, but by the cosurety, but this circumstance is not sufficient to take the case out of the rule. The right of the creditor to lay hold, by proceedings in equity, of collateral securities given by the principal debtor to the security, is founded upon the equitable principle of subrogation, and such right is conceded to the creditor for the avoidance of circuity of action. This equity is quite as strong in favor of a surety (when the principal is insolvent) against his cosurety. The present case falls clearly within the reason of the rule. As towards the holders of the bonds, Welsman and Trenholm are liable each for the entire debt; as between each other, under this agreement, Welsman is liable for 31.71, and Trenholm 40.71. To prevent either of them from being first harassed for the entire debt, and then turning him round to seek indemnity, through the mortgage given by his coguarantor, equity will permit the creditors to proceed in the first instance against the mortgaged property, and to enforce it to the same extent that the mortgagee could have enforced it had he been compelled to pay the entire debt." Whereas the said master should have reported that the said agreement between the said George A. Trenholm and James T. Welsman, having been made to ascertain the amount, as between themselves, for which each should be liable, and the mortgages having been executed, as between themselves, for protection against the overpayment of amounts so ascertained between themselves, such mortgages were indemnities between the said George A. Trenholm and
173 James T. Welsman only, and did not enure, as securities for the bondholders, and that under no principles of equity, are or can the bondholders be held entitled to the principle of subrogation in this case.

SECOND EXCEPTION.—For that the said master in his said report says: "It is urged by the executor of James Welsman, who holds a junior mortgage upon a part of the property embraced in the Trenholm mortgage, and by the administrator of Christopher Hampton, who holds a junior judgment which binds all the property of both Welsman and Trenholm, that the object of these mortgages was simply to indemnify Wels-

man and Trenholm from over payment; and that inasmuch as neither of them has, in fact, overpaid his stipulated portion of the bonds, neither they nor the creditors who claim through them have a right to enforce the mortgages. "This is claimed to be specially the case in reference to the Trenholm mortgage, Welsman, having failed in his life-time to contribute any considerable amount to the payment of the bonds, and it being reasonably certain that the entire assets of his estate will, even under the most favorable circumstances, fail to pay his proportion. This contention appears to me to be based upon a misapprehension of the scope and extent of these instruments. That Trenholm and Welsman did not regard these mortgages as having been given simply for the purpose of indemnity is evident from the endorsement made by Welsman in January, 1873, upon the bonds then paid by Mr. Trenholm. His endorsement clearly recognizes the Welsman mortgage as a security in the hands of Trenholm and his assigns for Welsman's proportion of the money so advanced by Trenholm to pay these bonds, though the amount fell short of $400,000. The parties themselves having given a practical construction to the contract, that construction will be enforced, nor is there anything in the language employed in the mortgage to sustain the construction contended for. They are conditioned not for the indemnity of Welsman and Trenholm, but for "the performance of the covenants, agreement, and understanding contained in the memorandums of agreement," bearing even date with the mortgages. What are the covenants? That Trenholm should be liable for the full discharge of $400,000, and Welsman for the full discharge of $310,000 of the guaranteed bonds, and they should indemnify each other against the payment of more than the amounts and proportion there agreed upon. "The object contemplated was obviously not simply
174 indemnity. The mortgages were intended as security for the payment by each of the guarantors of the amount which he had assumed. Until this was done these mortgages constituted liens on the mortgaged property, and it was not in the power of either of the guarantors, without the consent of the other, to create a junior lien which could take precedence of them." Whereas the said master should have reported that on the 13th of May, 1871, the said James T. Welsman, not having paid any part of the said "B" bonds, was not in advance of the amount undertaken to be paid by him under the said agreemant, and not entitled to any benefit arising under the deed of mortgage executed to him by the said George A. Trenholm as of that date; and that the execution on 13th June, 1871, by George A. Trenholm to James T. Welsman, executor of James Welsman, the testator of these exceptors, of the deed of mortgage upon the undivided fifth parts of the lot of land whereon stands the Pavilion Hotel, to secure a debt due by the said George A. Trenholm to the said James Welsman, deceased, was the creation of a valid subsisting lien upon property upon which there was then no existing lien, and that the lien created by such mortgage was made by the concurrence and with the full consent of each of the guarantors, James T. Welsman and George A. Trenholm, and did create a lien in precedence of the prior executed mortgage of indemnity or security executed by George A. Trenholm to James T. Welsman on 3d May, 1869, and the acceptance of such mortgage by the said James T. Welsman as executor of James Welsman, was a waiver by James T. Welsman of any

and all claim for precedence on the mortgage of indemnity or security held by him, if any he then had.

THIRD EXCEPTION.—For that the said master, in his said report, says: "B bonds remain outstanding to the amount of $680,145, a part of which belong absolutely to the present holders, and a part are held as collateral securities. The claims against these bonds, according to the statement furnished to me by Mr. Trenholm, is $464,846, exclusive of interest. The payments made on account of B and C bonds by Mr. George A. Trenholm, or George A. Trenholm & Son, including interest thereon, amount to..... $531,616 61

"The receipts from the collaterals placed in the hands of Mr. Phillips amount to..... 423,162 16

"The excess of payments over receipts from collaterals is..... $108,454 45

175 "Which latter amount has been paid by Mr. Trenholm out of his individual means.

"The amount due upon the B bonds now outstanding is, according to the testimony of Mr. W. L. Trenholm, exclusive of interest..... $464,846 00

"Add to this amount the payments made by Mr. Trenholm.. 108,454 00

"And we have the amount contributed by his sureties..... $573,300 00

"Of this amount the estate of Mr. Trenholm is liable for.. 322,986 00

"Less amount paid..... 108,454 00

"Leaving due by that estate..... $214,532 00

"The estate of Welsman is liable for..... 250,314 00"

And for that the said master, in his report, further says: "It is a well-established rule, however, that creditors claim the benefit of a mortgage through the equities of a mortgagee. They can claim only what the mortgagee, to whose rights they are subrogated, could have claimed. In this case the mortgagee of Trenholm, as we have seen, was intended to stand as a security to Welsman only for that proportion of the bonds which Trenholm had assumed to pay, and to this extent only can it be enforced by the bondholders. Assuming, for the purpose of illustration, that the amount which sureties have to pay is $573,000, as I have stated in a previous part of this report, and that the proportion for which the estate of Trenholm is still liable is $214,532, that sum will constitute the limit to which the bondholders can charge his estate under the mortgage. Should the property embraced in the mortgage realize more than that sum, the surplus must go to the junior encumbrances, and not to the bondholders. As to any balance which may be due to them, and which they fail to realize out of the estate of Welsman, they will stand upon the footing of unsecured creditors of the estate. This is also true of the Welsman mortgage." Whereas the said master should have reported that it appeared by the testimony that there are now outstanding in the hands of original holders $178,888.89, of which, according to the principles of the said report, the estate of Trenholm is liable for $100,782.40, and that sum will constitute the limit to which the bondholders can charge his estate under the mortgage; and

should the property embraced in his mortgage realize more than that sum, the surplus must go the junior encumbrancers. And that the said master should also have reported that out of the said sum of
176 $178,888.89 in the hands of the original holders the amount of $11,936.40 were proved by Geo. A. Trenholm & Son in liquidation; that George A. Trenholm, one of said copartners, being one of the guarantors upon the said bond, the possession by him of the said bonds was an extinguishment of the same, as against these exceptors, to the amount which the said George A. Trenholm as such copartner was entitled to in the said bonds; and that the said master should also have reported, according to the principles of said report, that James T. Welsman having paid no part of the "B" bonds, according to the testimony before the said master, there was no equity in the said James T. Welsman as mortgagee under the mortgage executed to him by the said George A. Trenholm on 3rd May, 1869, which could be claimed or enforced by the said James T. Welsman, and consequently no right or equity through him to which the bondholders as creditors could be subrogated, or under which they could claim, as against these exceptors.

FOURTH EXCEPTION.—For that the said master in his said report says: "Immediately after my appointment as special master in this case, I advertised, in pursuance of the order of court, for the holders of B and C bonds to produce and prove their bonds before me. The following is a statement of the bonds so produced and proved, exclusive of interest:

"B bonds proved by original holders.....	$178,888 89
"B bonds proved by persons holding them as collateral security for notes, amounting in the aggregate to $ exclusive of interest.....	457,501 97
"Making the total amount of B bonds produced and proved	$636,390 86

"A more detailed statement of these bonds will be found hereto annexed, and marked Exhibit." And for that the said master in his report further says: "It is further claimed by the junior lien creditors that, as to some of the bonds proved, Mr. Welsman has been discharged from liability in consequence of the holders having given time to Mr. Trenholm, by taking his note, payable at a future day, and that certain other of said bonds which were taken up by Mr. Trenholm, and afterwards pledged by him, are not entitled to the benefit of his mortgage to Welsman. I ask leave to make the question thus raised, the subject of a future report." And for that the said master in his report further says: "I therefore recommend that the property mentioned in the mortgages be sold, at an early day,
177 and the proceeds applied to the payment of the bondholders to the extent that I have indicated." Whereas the said master should have reported, that of the $636,390.86 of "B" bonds proved before him, such bonds to the amount of $457,501.97 are held as collateral securities for notes amounting to $219,218.18; that the bonds thus held as collateral securities were bonds which had been taken up by the said George A. Trenholm and reissued by him; that as so reissued, such bonds are not entitled to any rights or equities prior to the right of these exceptors under the mortgage executed by the said George A. Trenholm to James T. Welsman, executor of James Welsman, the testator of these exceptors, on 13th

June, 1871, but if there are any rights or equities in the bondholders as creditors claiming to be subrogated to the rights or equities of James T. Welsman under the mortgage executed to him by George A. Trenholm on 3d May, 1869, such rights or equities are by such reissue postponed to *to* the rights of these exceptors. That the said master should also have reported that the bonds so reissued, were, as to these exceptors, extinguished when the same came into the hands and possession of the said George A. Trenholm, as regards the mortgage held by these exceptors, and if any rights or equities under the mortgage of 3d May, 1869, enured to the holders of such reissued bonds, such rights or equities commenced, if at all, only from the dates of such reissues, as against these exceptors, and that none of the holders of such reissued bonds have shown that they held such reissued bonds prior to the date and execution of the mortgage held by these exceptors. And that the said master should have reported recommending that the property mentioned in the mortgage be sold by the executor of George A. Trenholm, and by the executors of James T. Welsman, respectively, as prayed for by the bill, and that the proceeds of sales, after deducting the expenses of such sales and the commissions of the said executors, respectively, should be paid into court to await the determination of the several questions raised in relation to such property.

FIFTH EXCEPTION.—For that the said master in his said report states as his conclusion from the testimony: "Both the principal debtors are in bankruptcy. The liability of the guarantors has become absolute. Their estates are not in a condition to make payment of the bonds." Whereas the said master should have reported that the testimony showed that the said James T. Welsman had not only not paid a greater amount that
178 by the agreement of 3d May, 1869, he was liable for as to his co-guarantor George A. Trenholm, but it showed that he was largely indebted to the said George A. Trenholm for overpayments by the latter, and it further showed that the estate of the said James T. Welsman was utterly unable to either meet any payments in excess or even to repay the overpayments, and consequently such estate could by no possibility be entitled to indemnity from the estate of George A. Trenholm, and the bondholders as creditors claiming to be subrogated through the said James T. Welsman to rights or equities as against the property of the said George A. Trenholm included in the mortgage of 3d May, 1869, could at the most, claim only such rights or equities as the said James T. Welsman could have, and the testimony shows he never had any rights or equities which became real or operative, and his estate cannot by any possibility have any such rights or equities. And the said master should consequently have reported that as to the mortgage held by these exceptors, the said James T. Welsman never had, and his estate cannot possibly have, any real, operative mortgage, and that the mortgage held by these exceptors is the only subsisting, valid operative mortgage on the three undivided fifth parts of the property designated as the Pavilion Hotel.

SIXTH EXCEPTION.—For that the said master in his said report has said: "I am therefore of opinion that while the claim of Mrs. Trenholm to have the amount of the judgement obtained by her in the probate court paid out of the proceeds of the real estate sold by order of this court, cannot be allowed, she is entitled to receive one-sixth of all the proceeds of said sales," etc. And has reported as a fact that "upon the mortgage

to James T. Welsman, executor of the three undivided fifths of the Pavilion Hotel, her dower was renounced." Whereas the said master should have reported that Mrs. Anna Helen Trenholm, having renounced her dower as to the three undivided fifths of the Pavilion Hotel upon the mortgage held by these exceptors, is entitled to dower only in such surplus as may remain upon a sale of the undivided three-fifths of the Pavilion Hotel, after the payment of the debt held by these exceptors as executrixes of James Welsman, and secured by the mortgage of 13th June, 1871, upon which she renounced her dower.

DESAUSSURE & SON,
Solicitors of Executrixes James Welsman.

179 No. 15.

Memorandum of agreement between George A. Trenholm and James T. Welsman.

Memorandum of agreement between Geo. A. Trenholm, of the one part, and James T. Welsman, of the other.

Whereas in the settlement of the affairs of John Fraser and Company in the city of Charleston, in the State of South Carolina, and of Frazer, Trenholm and Company, in the town of Liverpool, in the Kingdom of Great Britain, for the complete settlement with their creditors of the liabilities of the said firms, Theodore D. Wagner and William L. Trenholm, two of the copartners of the said firms, did, on the twenty-fifth day of November, anno Domini one thousand eight hundred and sixty-seven, enter into and execute a memorandum of agreement between them, the said
180 Theodore D. Wagner and William L. Trenholm, in behalf of John Fraser and Company and Fraser, Trenholm and Company and the several parties creditors of the said firms, or either of them, whose names are signed to the said memorandum of agreement; and in the third article of the said memorandum of agreement it is provided that the said Theodore D. Wagner and William L. Trenholm agree to execute bonds for the aggregate sum of seven hundred and ten thousand dollars ($710,000), secured by a personal guaranty and endorsement, to be approved by the aforesaid trustees, meaning thereby James Robb and Charles T. Loundes, who, in the second article of the said memorandum of agreement, had been named as trustee for the said creditors. And the said bonds have been duly executed by the said Theodore D. Wagner and William L. Trenholm, and the said George A. Trenholm and James T. Welsman have become bound by such personal guaranty and endorsement for and on the said bonds, and have
181 been approved by the said trustees; and whereas the said memorandum of agreement of the twenty-fifth day of November, anno Domini one thousand eight hundred and sixty-seven, for its completion and the accomplishment of the settlement with the creditors of the said firms, or either of them, required a supplemental agreement, which was termed memorandum of final settlement between Fraser, Trenholm and Company, John Fraser and Company, and the holders of their protested paper, bearing date the sixteenth day of November, anno Domini one thousand eight hundred and sixty-eight, and signed by Jos. Larocque, John E. Ward, and William L. Trenholm, and in the second article of the said memo-

randum of final settlement it was provided that the joint obligation of George A. Trenholm and James T. Welsman, in form to be approved by John E. Ward and Joseph Larocque, are to be given for one shilling and six pence of the eight shillings in the pound, payable in England
182 by the inspectors of Fraser, Trenholm and Company's estate, under the fifth clause of the existing agreement, referring to the agreement of the twenty-fifth November, anno Domini one thousand eight hundred and sixty-seven, payable in one, two, and three years, with interest from date at six per cent. per annum; the said one shilling and six pence to be converted into currency at the rate of six dollars and fifty cents to the pound; and the said George A. Trenholm and James T. Welsman have duly made and executed such obligation; and whereas the said George A. Trenholm and James T. Welsman in being bound by the said guaranty and endorsement, provided in the third article of the agreement of the twenty-fifth November, anno Domini one thousand eight hundred and sixty-seven, did between themselves agree that the limit and extent of the amounts for which each of them would respectively
183 be liable should be as follows—that is to say, of the said sum of seven hundred and ten thousand dollars, that the said George A. Trenholm should be liable for the sum of four hundred thousand dollars, and the said James T. Welsman for the sum of three hundred and ten thousand dollars, and that in the obligation to be given under the second article of the said memorandum of final settlement of the sixteenth November, anno Domini one thousand eight hundred and sixty-eight, the said George A. Trenholm should be liable for forty of seventy-one parts thereof, and the said James T. Welsman should be liable for thirty-one of seventy-one parts thereof; and the said George A. Trenholm and James T. Welsman have become parties to such guaranty and endorsement, and have executed such other obligation with the clear understand-
184 ing and agreement that each would be respectively liable to the other for the full discharge of the said sum and the said proportion by them respectively undertaken, and that each would save and keep harmless and indemnified the other from all claim, demand, and damage for or by reason of the said guaranty and endorsement, and of such obligation beyond the amount or proportion by each respectively assumed as hereinbefore stated; and whereas the said George A. Trenholm and James T. Welsman have, in all respects, and from the creation of such liability on them respectively, fully, and in good faith, intended to keep each the other indemnified from all claim, demand, and damage, and in further pursuance thereof, did agree, by proper conveyances, by way of mortgage, or otherwise, if so advised, to transfer each to the other such property, to them respectively belonging, as would secure each
185 against the other from all claim, demand, and damage, as hereinbefore stated; and whereas it is fit and proper that such understanding and agreement between them shall be in all respects made certain by this memorandum in writing: Now, therefore, the said George A. Trenholm and James T. Welsman do, severally and each, by his execution of these presents, agree and declare that all that is hereinbefore recited and set forth fully and truly recites and sets forth the understanding and agreement made and now subsisting between them in relation to the said guaranty and endorsement and the other obligation by them made,

and particularly that it does fully and truly recite and set forth the amounts and proportions for which each as to the other is respectively liable because of the said guaranty and endorsement, and the said obligation by them made and undertaken, and that each is as to the other bound
186 fully to discharge and satisfy such amount and such proportion as is hereinbefore recited and set forth, as so undertaken by each as the amount and proportion for which he is liable, and that each will save and keep harmless and indemnified the other from all claim, demand, and damage for or by reason of the amount or proportion so undertaken by him. And the said George A. Trenholm and James T. Welsman do further agree that at any time when either of them shall so require, each shall, by proper conveyance and by way of mortgage, secure to the other any or all of the real estate of which each may be seized, and such mortgage shall be held by each for his more perfect indemnity, because of the said guaranty and endorsement, under the said memorandum of agreement of the twenty-fifth November, anno Domini one thousand eight hundred and sixty-seven,
187 and other obligation under the said memorandum of final settlement of the sixteenth November, anno Domini one thousand eight hundred and sixty-eight.

In witness whereof the said parties have hereunto set their hands and seals this third day of May, anno Domini one thousand eight hundred and sixty-nine.

[SEAL.] G. A. TRENHOLM.
J. T. WELSMAN.

Witnesses:
E. W. MACBETH.
GEO. REID.

THE STATE OF SOUTH CAROLINA,
Charleston County:

Personally appeared before me E. W. Macbeth, and made oath that he saw the within named George A. Trenholm and James T. Welsman sign, seal, and as their act and deed deliver the within written deed, and that he, with Geo. Reid, subscribed their names as witnesses to the execution thereof.

188 E. W. MACBETH.

Sworn to before me this 3rd day of May, A. D. 1869.
JOHN E. PHILLIPS,
Notary Public and ex-officio Magistrate.

Mortgage of James T. Welsman to George A. Trenholm.

The State of South Carolina to all to whom these presents may come:

I, James T. Welsman, of the city of Charleston and State aforesaid (merchant), send greeting: Whereas I, the said James T. Welsman, and George A. Trenholm, of the said city and State (merchant), in pursuance of and in the execution of a certain memorandum of agreement, bearing date the twenty-fifth day of November, anno Domini one thousand eight hundred and sixty-seven, signed by Theodore D. Wagner and William L. Trenholm, and certain creditors of the firms of John Fraser and Company, and Fra-
189 ser, Trenholm and Company, and in pursuance and execution of a cer-

tain other memorandum of final settlement between the said firms and their creditors, dated the sixteenth day of November, anno Domini one thousand eight hundred and sixty-eight, and signed by Joseph Larocque, John E. Ward, and the said William L. Trenholm, have heretofore bound ourselves by personal guaranties and endorsements upon certain bonds, for the aggregate sum of seven hundred and ten thousand dollars ($710,000), and have further made and executed other obligations, whereby they have become bound for other large sums; and whereas at the time of the execution of the aforesaid guaranties, endorsements, and obligations, it was agreed and understood between me, the said James T. Welsman, and the said George A. Trenholm, that, as between us, I, the said James T. Welsman, should
190 be liable, on account of the said guaranties and endorsements for seven hundred and ten thousand dollars, to the extent of three hundred and ten thousand dollars, and the said George A. Trenholm to the extent of four hundred thousand dollars, and that I, the said James T. Welsman, should be liable, on account of the other obligations aforesaid, to the extent of thirty-one of seventy-one parts thereof, and the said George A. Trenholm to the extent of forty of seventy-one parts, and that I, the said James T. Welsman, and the said George A. Trenholm, should each save the other harmless on account of any claim by reason of the said guaranties, endorsements, and obligations, beyond the proportion so agreed to be assumed by each, and that each should convey to the other, by way of mortgage, such property, to them respectively belonging, as would secure each against any claim on account of the said guarantees, endorsements, and obligations, beyond the said proportion
191 thereof assumed by each; and whereas, also, I, the said James T. Welsman, and the said George A. Trenholm, did, by a certain memorandum of agreement, bearing even date with these presents, fully set forth, acknowledge, and ratify in writing the said agreement and understanding between us, and did mutually covenant for the due performance thereof; and whereas, I, the said James T. Welsman, am now minded to perform my said agreement and understanding with the said George A. Trenholm, and to execute to him the said conveyance by way of mortgage:

Now, know all men by these presents, that for and in consideration of the premises, and in pursuance of the aforesaid memorandum of agreement between me, the said James T. Welsman, and the said George A. Trenholm, bearing even date with these presents, and in order to secure the said George A. Trenholm, the due performance of the same and
192 of the covenants therein contained, and in further consideration of the sum of five dollars, to me in hand paid by the said George A. Trenholm at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, I, the said James T. Welsman, have granted, bargained, and sold, and do by these presents grant, bargain, and sell, unto the said George A. Trenholm, all that lot, piece, or parcel of land, with the buildings thereon, situate, lying, and being in the city of Charleston, on east side of East Bay street, butting and bounding west by East Bay street; south and east by lands of proprietors of Southern wharf; north by the south street leading to commercial wharf. Also, all that other lot, piece, or parcel of land, with the buildings thereon, situate, lying, and being in the city of Charleston, on east side of East Bay

street, butting and bounding west by East Bay street; south by
193 South street leading to commercial wharf; east by lands of the proprietors of commercial wharf; north by the north street leading to commercial wharf. Also, all that other lot of land and house situate, lying, and being on east side of East Bay street, in the city of Charleston, butting and bounding north by lands of trust estate Elizabeth Condy; east by lands of ; south by lands of James Mathews; west by East Bay street. Also, all that other lot, piece, or parcel of land, and buildings thereon, situate, lying, and being on the east side of East Bay street, in the city of Charleston, butting and bounding north by lands of Street and West; south by lands of George A. Locke; east by lands of Rhett and Robson; west by East Bay street, recorded mesne conveyance office, book T, No. 14, page , Feb. 8th, 1864. Also, all that other lot, piece, or parcel of land, with buildings thereon, situate, lying, and being on the east side
194 of King street, No. 50, butting and bounding north by lands of C. B. Northrop; east on land of Nathaniel Russell; south on land of John Duncan, and west on King street. Also, lot of land north of the above described, butting and bounding north by lands of McDonald and Scotch Presbyterian Church; east on lands of Alston; south on lot above described, and west on King street. Also, all that other lot, piece, or parcel of land, with buildings thereon, situate, lying, and being on north side of Society street, in the city of Charleston, butting and bounding north by lands of estate Matthews; east on land of H. R. Stocker and St. Stephen's Chapel School lot; south in Society street, and west on lands of J. C. Burcknyer. Also, all that other lot and house situate, lying, and being on west side of East Bay street, No. 43, in the city of Charleston, butting and bounding east on East Bay street; south on lands of Caspar Shutt; west on
195 lands hereinafter described; north on lands of Daniel Stevens. Also, another lot of land attached to above, measuring in width forty (40) feet, and in depth seventy-six (76) feet ten (10) inches. Also, all that other lot, piece, or parcel of land, situate, lying, and being on north side of Wentworth street, in the city of Charleston, butting and bounding front thirty-five (35) feet, depth one hundred and four (104) feet, north on land of Paul Remly; east on land of C. W. Seignious; south on Wentworth street, and west on lands of M. L. Cohen. Also, all that other house and lot situate, lying, and being on north side of Hayne street, number 15, of plat City Land Company, by R. K. Payne, May, 1850, in the city of Charleston, butting and bounding south on Hayne street; east on party wall, separating it from lot No. 16; north on lot No. 17; west on lot No. 14. Also, all that other lot of land and
196 building, situate, lying, and being on the west side of East Bay street, No. 47, in the city of Charleston, butting and bounding east on East Bay street; south on the alley, the common property of the owners of this and lot north side of the alley; west on land formerly of M. McCall; north on land formerly of George Reid. Also, all that other lot, piece, or parcel of land, with buildings thereon, on the east side of Mazyck street, No. 4, situate, lying, and being in the city of Charleston, butting and bounding west by Mazyck street; north by lands of the Misses Cobia; east by land of now or formerly of David A. King, and south by lands of Dennis D. Bunch. Also, all that other lot of land in Mazyckboro', in the city of Charleston, bounded north on another part of wharf

lot; east on channel of Cooper River; south on lot No. 15, and part on the canal of 20 feet, left for extensoin of Calhoun street; west on Washington street and lot No. 15, the space of 40 feet left in
197 said plat for Marsh street never having been opened by R. F. Smith. Also, all that other lot, piece, or parcel of land, with the buildings thereon, corner Calhoun and Washington streets, situate, lying, and being in the city of Charleston, butting and bounding west on Washington street; south on Calhoun street; north and east on water lots of R. F. Smith. Also, all that property known as Southern wharf, situate, lying, and being in the city of Charleston, butting and bounding north on old custom-house and Chisolm's wharf; east on the channel of Cooper River; south on lands of Missroon and Benjamin Smith, and west on East Bay street, recorded in book S, No. 14, page 281: To have and to hold all and singular the said premises unto the said George A. Trenholm, his heirs and assigns forever; provided, nevertheless, always, and it is
198 the true meaning and intent of these presents, that if I, the said James T. Welsman, my heirs, executors, or administrators, shall well and truly perform the said covenants, agreement, and understanding contained in the said memorandum, bearing even date with these presents, and hereinbefore described in manner and form as the same are in the said memorandum set forth and declared, according to the true intent and meaning of the said memorandum last named, then these presents shall be null and void; otherwise shall remain in full force and virtue. And it is understood and agreed that I, the said James T. Welsman, shall retain possession of the said mortgaged premises until there shall be default in the performance of the said agreement intended to be secured by these presents.

Witness my hand and seal this third day of May, anno Domini one thousand eight hundred and sixty-nine.

199 J. T. WELSMAN. [L. S.]

Signed, sealed, and delivered in the presence of (the words "adjoining the above," on 11th line of 3rd page, being first erased)—

W. LINDSAY,
JAMES LOWNDES.

STATE OF SOUTH CAROLINA,
Charleston County:

Personally appeared before me William Lindsay, and made oath that he saw the within-named James T. Welsman sign, seal, and, as his act and deed, deliver the within-written deed, and that he, with James Lowndes, witnessed the execution thereof.

W. LINDSAY.

Sworn to before me this 6th day of May, A. D. 1869.

A. G. MAGRATH, JR.,
Not. Pub. and Mag. ex off.

No. 17.

Mortgage of George A. Trenholm to James T. Welsman.

200 The State of South Carolina to all to whom these presents may come:

I, George A. Trenholm, of the city of Charleston, and State aforesaid (merchant), send greeting: Whereas I, the said George A. Trenholm, and James T. Welsman, of the said city and State (merchant), in pursuance of and in the execution of a certain memorandum of agreement bearing date the twenty-fifth day of November, anno Domini one thousand eight hundred and sixty-seven, signed by Theodore D. Wagner and William L. Trenholm and certain creditors of the firms of John Fraser & Co. and Fraser, Trenholm & Co.; and in pursuance and execution of a certain other memorandum of final settlement between the said firms and their creditors, dated the sixteenth day of November, anno Domini one thousand eight hundred and sixty-eight, and signed by Joseph La-
201 rocque, John E. Ward, and the said William L. Trenholm, have heretofore bound ourselves by personal guaranties and endorsements upon certain bonds for the aggregate sum of seven hundred ten thousand dollars ($710,000); and have further made and executed other obligations whereby they have become bound for other large sums; and, whereas, at the time of the execution of the aforesaid guaranties, endorsements, and obligations it was agreed and understood between me, the said George A. Trenholm, and the said James T. Welsman that, as between us, I, the said George A. Trenholm, should be liable on account of the said guaranties and endorsements for seven hundred and ten thousand dollars to the extent of four hundred thousand dollars, and the said James T. Welsman to the extent three hundred and ten thousand dollars, and that I, the said George A. Trenholm, should be liable on account
202 of the other obligations aforesaid to the extent of forty of seventy-one parts thereof, and the said James T. Welsman to the extent of thirty-one of seventy-one parts thereof; and that I, the said George A. Trenholm, and the said James T. Welsman should each save the other harmless on account of any claim by reason of the said guaranties, endorsements, and obligations beyond the proportion so agreed to be assumed by each, and that each should convey to the other, by way of mortgage, such property to them respectively belonging as would secure each against any claim on account of the said guaranties, endorsements, and obligations beyond the said proportion thereof assumed by each. And whereas, also, I, the said George A. Trenholm, and the said James T. Welsman did, by a certain memorandum of agreement bearing even date with these presents, fully set forth, acknowledge, and ratify
203 in writing, the said agreement and understanding between us, and did mutually covenant for the due performance thereof.

And whereas I, the said George A. Trenholm, am now minded to perform my said agreement and understanding with the said James T. Welsman, and to execute to him the said conveyance by way of mortgage. Now, know all men by these presents that, for and in consideration of the premises, and in pursuance of the aforesaid memorandum of agreement between me, the said George A. Trenholm, and the said James T. Welsman, bearing

even date with these presents, and in order to secure the said James T. Welsman the due performance of the same, and of the covenants therein contained, and in further consideration of the sum of five dollars to me in hand paid by the said James T. Welsman, at and before the en-
204 sealing and delivery of these presents, the receipt whereof is hereby acknowledged, I, the said George A. Trenholm, have granted, bargained, and sold, and do by these presents grant, bargain, and sell, unto the said James T. Welsman all that lot, piece, or parcel of land, with buildings thereon, situate, lying. and being at northwest corner King and Wenthworth street, in the city of Charleston, butting and bounding north on lands of Lazarus, south on Wenthworth street, east on King street, and west on lands of , No. 259, per plat of lands of Mordecai Cohen. Also, all those other two lots, pieces, or parcels of land adjoining each other, with the three story brick dwelling, situate, lying and being on the north side of Lamboll street, in the city of Charleston, butting and bounding north on lands of W. B. Pringle, formerly William Alston; south on Lamboll street; east on lands of R. O. Dannell, late of
205 Mrs. Thomas; west on lands of Baker, late of the Rev. Ed. Jenkins. Also, all that other lot, piece, or parcel of land situate, lying, and being in Broad street, No. 31, with buildings thereon, in the city of Charleston, butting and bounding north on Broad street, east on land formerly of T. M. Hume, west on land sowned by Marshall, south on lands of estate Col. G. W. Brown. Also, all that other lot, piece, or parcel of land, with house thereon, situate, lying, and being at the corner of East Bay and Elliott streets, in the city of Charleston, butting and bounding front on East Bay street, north on Elliott street, east on a passage common to all, the lots and buildings the same; south on another with like conditions. Also, all that other lot, piece, or parcel of land, with house thereon, situate, lying, and being on south side of Hayne street, No. 36, in Payne's plat No. 16, on city plat, in the city of Charleston, butting and bounding
206 north on Hayne street twenty-two (22) feet one (1) inch, east on party wall separating it from lot No. 37 one hundred and seventeen (117) feet two (2) inches, south partly on lots Nos. 61 and 62 twenty-two (22) feet one (1) inch, and west on party wall separating it from No. 35 one hundred and seventeen (117) feet two (2) inches. Also, that moiety or half of a lot, piece, or parcel of land situate, lying, and being on the south side of Broad street (being eastermost moiety), in the city of Charleston, which measures in the whole in front and north on Broad street fifty-four (54) feet; east on lands formerly of David Ramsay, lately of Mordecai Cohen, and now of Thos. W. Mordecai, one hundred and forty (140) feet; south by lands formerly of Thomas Waring fifty-four (54) feet, and west by lands formerly of Stephen Lee, afterwards of
207 Paul Smizer, and lately of Lockwood, one hundred and forty (140) feet, with the use of a passage-waz *way* of seven (7) feet and six (6) inches common to both moieties. Also, all that other lot, piece, or parcel of land, with buildings thereon, situate, lying, and being on the east side of State street, opposite Chalmers street, in the city of Charleston, butting and bounding north on lands of Union Bank, south on lands of Mr. McBride, east by lands of Z. B. Oakes, and west by State street. Also, all that other lot, piece, or parcel of land, with house thereon, situate, lying, and being on the north side of Beaufain street, No. 6, in the city of

Charleston, butting and bounding south on Beaufain street, east on lands of Andrew Cunningham, north on lands of Andrew Cunningham, and west on lands of estate James Calder. Also, all that other
208 lot, piece, or parcel of land, with house thereon, situate, lying, and being on south side of Society street, in the city of Charleston, butting and bounding north by Society street thirty-six (36) feet, east by lands of John Lafar one hundred (100) feet, south by lands of thirty-six (36) feet, and west by lands of A. N. Bell one hundred (100) feet. Also, all that other lot, piece, or parcel of land and buildings thereon known as Carolina coffee-house, and lot adjoining, situate, lying, and being in Tradd street, in the city of Charleston, butting and bounding south on Tradd street, west on lands formerly of Adam Ewing, north on lot hereinafter mentioned, and east on Bedon's alley; lot adjoining bounding east on Bedon's alley, south on Carolina coffee-house, west on lands formerly of Wilson, north on lands formerly of Martin E. Munro. Also, all those other four lots, pieces,
209 or parcels of lands, with buildings thereon, situate, lying, and being at southwest corner East Bay and Hasel streets, in the city of Charleston, butting and bounding east on East Bay street; north on Hasel street; west on land of H. Bischoff; south on land of Z. Miller. Also, all that other lot, piece, or parcel of land, situate, lying, and being on the east side of Church street, in the city of Charleston, butting and bounding east by lands of Wm. Bell; south by lands Nath'l Russell and Jane Livingston; west, on Church street; north, on lands of Geo. Kinloch and T. W. Mordecai, and known as number 460. Also, all that other lot, piece, or parcel of land, with house thereon, situate, lying, and being on the west side East Bay street, in the city of Charleston, butting and bounding south on lands of W. L. Porter; north
210 on lands of James Lamb; west on land of Heilbron; east on East Bay street, with right of carriageway through Longitude lane and Mitchell's cotton-press lot. Also, all that other lot, piece, or parcel of land, situate, lying, and being on Concord street, in the city of Charleston, measuring on said street sixty-three (63) feet; on south line fifty (50) feet; then north thirty-three (33) feet; then running east forty (40) feet; thence north on east line, thirty (30) feet, and on the north line ninety (90) feet, recorded in book T, No. 142, page 36, Sept. 7th, 1863. Also, all that other lot, piece, or parcel of land, situate, lying, and being on south side of Bull street, butting and bounding, front on Bull street, forty-one (41) feet, depth one hundred and fifty-seven feet; east on lands now or lately of ; west
211 on lands formerly of Jno. Dawson, but now of ; north on Bull street. Also, all that other lot, piece, or parcel of land, situate, lying, and being on east side of Friend street, in the city of Charleston, butting and bounding north by lands of Right Rev. Dr. Lynch; south by lands of Mrs. Belser; east by lands of Right Rev. Dr. Lynch; west by Friend street. Also, all that other lot, piece, or parcel of land, situate, lying, and being at northeast corner Bogard and Rutledge streets, in the city of Charleston, butting and bounding north by lands of Harriet Evans, and east by lands of Amarantha Elliott. Also, all that other lot, piece, or parcel of land, situate, lying, and being on south side of Cumberland street, in the city of Charleston, butting and bounding east by lot formerly of Dr. J. W. Schmidt, but now of Dr. Robert Lebby; south by cemetery of Circular

Church; west by lot now or late of G. F. Rolando. Also, three
212 undivided fourth parts of the whole of those four wharves and four docks, comprising three wharves (excepting two lots), conveyed to R. S. Rhett and Robson, situate, lying, and being in the city of Charleston, with lots, buildings, and stores thereon, known as Atlantic Wharves. Also, three undivided fourth parts of the whole of the following lots, pieces, or parcels of land: One lot on the north side of Champney street, in the city of Charleston, conveyed by Nath'l Fields to Mills and Beach, recorded in book H, No. 12, page 51; lot on south side of Gillon street, in the city of Charleston, recorded in book G, No. 12, pages 446–'8; one lot covered with water, part of Dewees' Wharf, recorded in book M, No. 12, page 10; two lots on north side of Campney street, recorded in book R, No. 12, page 116; one lot corner Prioleau and Exchange streets, re-
213 corded in book F, No. 14, page 300. Also, three undivided fifth parts of the whole of the Pavilion Hotel, situate, lying, and being at the northwest corner of Meeting and Hasel streets, in the city of Charleston, butting and bounding north by lands of Mazyck, east on Meeting street, south on Hasel street, and west on lands of John Thompson. Also, all that lot, piece, or parcel of land, with the buildings thereon, situate, lying and being on Rutledge avenue, in the city of Charleston, butting and bounding north by Radcliffe street, east by Smith street, south by property of Mr. Magwood, and west on Rutledge avenue. Also, one-fourth part in Central Wharves and buildings thereon, situate, lying, and being in the city of Charleston, and butting and bounding north by Custom House Wharf, east by channel of Cooper River, south by Accommoda-
214 tion Wharf, the property of John Ferguson, and west by property of estate of Faber, of Mordecai & Co., and by property of the State Bank. Also, one-fourth part of store and lot, number 118 East Bay, situate, lying, and being in the city of Charleston, butting and bounding north by property of estate of Jeffords, east by Central Wharves, south by property of C. Lillenthal, and west by East Bay: To have and to hold all and singular the said premises unto the said James T. Welsman, his heirs and assigns forever; provided, nevertheless, always, and it is the true meaning and intent of these presents that if I, the said George A. Trenholm, my heirs, executors, or administrators shall well and truly perform the said covenants, agreement, and understanding contained in the said memorandum, bearing even date with these presents, and here-
215 inbefore described in manner and form as the same are in the said memorandum set forth and declared, according to the true intent and meaning of the said memorandum last named, then these presents shall be null and void; otherwise, shall remain in full force and virtue. And it is understood and agreed that I, the said George A. Trenholm, shall retain possession of the said mortgaged premises until there shall be default in the performance of the said agreement intended to be secured by these presents.

Witness my hand and seal this third day of May, anno Domini one thousand eight hundred and sixty-nine.

(Signed) G. A. TRENHOLM.

Signed, sealed, and delivered in the presence of—

(Signed) E. W. MACBETH.

(Signed) GEO. REID.

STATE OF SOUTH CAROLINA,
Charleston County:

Personally appeared before me E. W. Macbeth, and made oath that he saw the within-named George A. Trenholm sign, seal, and, as his act and deed, deliver the within-written deeds, and that he, with George Reid, witnessed the execution thereof.

(Signed) E. W. MACBETH.

Sworn before me this 3d day of March, A. D. 1869.

(Signed) J. E. PHILLIPS,
Notary Public and ex off. Magistrate.

And on the 3rd March, A. D. 1879, came into court the solicitors in the cause and obtained the following order for sale, which order is in the words and tenor following:

No. 18.

Order for sale.

In the United States circuit court, South Carolina district. In equity.

J. L. PHIPPS AND COMPANY IN BEHALF of himself and others, creditors of George A. Trenholm and James T. Welsman,
vs.
W. L. TRENHOLM, EXECUTOR OF GEORGE A. Trenholm, Wilmot G. DeSaussure, Robert N. Gourdin, executors, and Emma Welsman, executrix of James T. Welsman, and others.

On hearing the report of Samuel Lord, junior, the special master in this cause, under the order of reference heretofore made, it is ordered and adjudged that so much of the report as recommends the sale of the real estate mentioned and set forth in the pleadings be confirmed, and that the same be carried into execution in the manner hereinafter set forth.

It is ordered and adjudged that the said William L. Trenholm, executor of George A. Trenholm, and the said Wilmot G. DeSaussure, Robert N. Gourdin, and Emma Welsman, executors and executrix of James T. Welsman, do write in the advertisement of the sale of the real estate mentioned in the pleadings, giving twenty-one days' notice thereof in one or more daily papers of this State or in New York, if they should consider more than one advisable, and if but one that the Daily News and Courier of the city of Charleston, upon the following terms: One-third cash; balance in bond or bonds of the purchaser, payable in two equal annual instalments, with lawful interest from the day of sale, the payment thereof secured by mortgage of the property for the credit portion whereof such bond or bonds are given, and insurance on such buildings as are usually secured by insurance against fire.

It is further ordered and adjudged that the said William L. Trenholm, executor of George A. Trenholm, and the said Wilmot G. DeSaussure, Robert N. Gourdin, and Emma Welsman, executors and

executrix of James T. Welsman, do respectively execute title to the purchaser or purchasers of the several pieces or parcels of property ordered to be sold, according to the ownership thereof, whether of the said George A. Trenholm or the said James T. Welsman, and each shall, if the purchaser or purchasers so desire, execute and deliver a release thereof from any claim by or under any mortgage from George A. Trenholm to James T. Welsman, or from James T. Welsman to George A. Trenholm.

It is further ordered and adjudged that as the proceeds of the sale so to be made, after deducting therefrom such sums as are hereinafter mentioned, will be a fund in court, the distribution thereof to be hereafter ad-
220 judged. That the settlement of all sales to be made under this order shall be in the office of and subject to the revision of the special master hereinbefore named. That when the titles to the several pieces or parcels shall have been duly executed, and shall be done by the party or parties by whom they are to be executed, with the bonds and mortgages, they shall be placed in the hands of the said special master, and he shall, without delay, notify the purchaser or purchasers to comply with the terms of the said sale; and in case where insurance shall be required, the purchaser or purchasers shall cause insurance in some approved office to be made and the policy assigned. And if such purchaser or purchasers shall fail to comply within fifteen days from the time of such notice, the prop-
221 erty bid for by the party or parties failing to comply shall forthwith be again put up for sale, and such purchaser or purchasers shall be liable for the loss, if any, at such resale.

It is further ordered and adjudged that at the time when the said special master shall notify purchasers at the said sale that he is prepared to deliver title to the purchaser or purchasers of the said property so sold, such purchaser or purchasers shall pay to the said special master the cash portion of such sale, and bond, mortgage, and policy of insurance as is hereinbefore ordered; the purchaser or purchasers having liberty to pay the whole purchase-money in cash, if so minded. And from the purchase-money the said special master shall deduct and pay the costs and charges of these proceedings; the unpaid city taxes for the year 1878; and to Anna Helen Trenholm one-sixth of the amount for which
222 each piece or parcel of property shall be sold under this order, which belonged to the said George A. Trenholm, in his life-time, and in which she was entitled to dower. That for such clerical or other expenses as the said special master may incur, he shall be therefor paid by the executor of George A. Trenholm, and the executors and executrix of James T. Welsman, out of the commissions which are allowed to them respectively out of the proceeds of sales of the property of their respective testators, and now ordered and adjudged to be paid them by the said special master from the proceeds of the said sales; that is to say, 2½ per cent. on the amount of such sales, and 2½ per cent. on the net sum coming into the hands of the said special master; that is, the amount of said sales less the 2½ per cent. for commissions deducted for the executors.

223 It is further ordered and adjudged, that after making such deductions from the proceeds of the said sales, the said special master do deposit the cash, bonds, mortgages, and policies of insurance in the First National Bank in the city of Charleston, to be there kept and held subject to the further order of this court touching the disposition of the same.

This order to be without prejudice to any claim or claims of priority of lien asserted by any of the parties to this cause, and that all rights and equities be, and are hereby, transferred from the property ordered to be sold to the proceeds which shall arise from such sales.

3d March, 1879.

HUGH L. BOND.
GEO. S. BRYAN,
U. S. Judge, Dist. of So. Ca.

We consent that the foregoing order be entered in the above-entitled cause.

CHARLES H. SIMONTON,
For "B" Bond Creditors.

224 BUIST & BUIST,
Solicitors for all parties they represent.
DESAUSSURE & SON,
Att'ys, Ex'x James Welsman.
H. E. YOUNG, H. A. DESAUSSURE,
For Ex'ors J. T. Welsman.
MITCHELL & SMITH,
For Pl'ffs and Mrs. A. H. Trenholm.
RUDOLPH SIEGLING,
Surv'r of Simons & Siegling, for Ed. L. Trenholm.
JAS. B. CAMPBELL,
For C. T. Lowndes & Co.
A. G. MAGRATH,
For ex'r G. A. Trenholm.
THEODORE G. BARKER, AND
SIMONTON AND BARKER,
For Christopher F. Hampton, Administrator of Estate of Frank Hampton, deceased.

And on the 29th day of May, A. D. 1879, came into court the plaintiffs, by their solicitors, Mitchell & Smith, and obtained the following order confirming report of referee, and for the payment of fees and disbursements, &c.; which order is in the words and tenor following:

225 No. 19.

Order confirming report of referee, and for the payment of fees and disbursements, &c.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the circuit court. In equity.

J. L. PHIPPS & CO. ET AL.
vs.
THEO. D. WAGNER, WM. L. TRENHOLM ET AL.

This cause having come on to be heard on the report of the special

master Samuel Lord, jr., herein filed, and the exceptions to the same, and counsel on all sides having been heard:

Now, after full consideration of the same, it is ordered, and decreed that the said exceptions be overruled, and the said reports stand confirmed.

It is further ordered and decreed; that the said special master do
226 proceed forthwith to pay and distribute the net proceeds of the sales hereinbefore ordered and decreed, by order dated 3d March, 1879, after payment of the expenses and amounts therein ordered and authorized as follows, viz:

That the said master do (the same being consented to in open court) receive and pay to himself the sum of two thousand dollars as compensation for his services herein.

That he next pay to the firm of Mitchell & Smith, solicitors for the complainants, fifteen hundred dollars, as complainant's costs and expenses in and about the bill and proceedings herein and the establishment of the fund hereby distributed.

That he next pay and distribute the net balance remaining after the reservations hereinafter mentioned among the bondholders who have
227 already or shall before the distribution herein ordered prove their bonds herein pro rata according to the number of bonds held.

That before making such distribution the said special master do set aside and reserve sufficient to meet and discharge the State and city taxes as mentioned and ordered to be reserved in the order hereinbefore made on the 28th day of May, 1879, subject to the order of this court.

That said master do also reserve before such distribution in cash or bonds, of the purchasers under the sales in this cause before made, subject to the future order of this court, the sum of thirty-three thousand dollars to meet any decree that may hereafter be made upon the claims of C. T. Lowndes & Co., and the Charleston Gas Light Co., upon the bonds held by them, and that such bonds be not included in the distribution hereinbefore ordered.

228 That the said master is hereby authorized to sell such of the bonds given for the credit portion of the purchase money of the real estate sold herein as he can dispose of at their par value and to distribute the proceeds as herein ordered, and that proper assignments of such bonds and the mortgages securing the same be executed to the purchasers thereof.

May 29, 1879.

HUGH L. BOND.

And on the 29' May, 1879, came into court the defendants C. F. Hampton, administrator, Frank Hampton, by his solicitors, Simonton and Barker, and Maria C. Otis and Emma S. Welsman, executrixes of James Welsman, by their solicitors, DeSaussure & Son, and gave the following notice of appeal in open court, which notice is in the words and tenor following:

No. 20.

Notice of appeal.

229 UNITED STATES OF AMERICA,
Fourth Circuit, South Carolina District:

J. L. PHIPPS & CO. ET AL.
vs.
THEODORE D. WAGNER, WILLIAM L. TRENholm, et al. } In equity.

The defendants C. F. Hampton, adm'r, Frank Hampton, and Maria C. Otis & Emma S. Welsman, executors of James Welsman, give notice of appeal to the Supreme Court of the United States from the decree made this day.

29' May, 1879.

SIMONTON & BARKER,
For C. F Hampton, Adm'r.
DESAUSSURE & SON,
Sol'rs of Ex'ors, James Welsman.

And on the 4th day of September, A. D. 1879, came into court the defendants, Maria C. Otis and Emma S. Welsman, executrixes of James Welsman, by their solicitors, DeSaussure & Son, and obtained the following order on appeal, which order is in the words and tenor following:

No. 21.

Order on appeal.

230 UNITED STATES OF AMERICA,
Fourth Circuit, South Carolina District:

J. L. PHIPPS ET AL.
vs.
THEODORE D. WAGNER, WILLIAM L. TRENholm, ex'or, et al. } In equity.

The defendants Maria C. Otis, and Emma S. Welsman, executrixes of the last will and testament of James Welsman, having appealed from the decree made in this case on 29' May, 1879, and the amount claimed by the said defendants out of the funds to be detained by the said appeal not exceeding sixteen thousand six hundred and fifty dollars, which amount is reserved in the hands of the special master, and two-thirds of such amount being in the bonds of the purchaser of the real property and secured by a mortgage of the property, while the net portion of the cash part of the sale is ordered to be invested in United States securities and held by the special master to abide the result of the appeal—

231 On motion of DeSaussure & Son, solicitors of Maria C. Otis and Emma S. Welsman, executrixes aforesaid, ordered, that the bond to be executed upon the appeal of the said Maria C. Otis and Emma

S. Welsman, executrixes aforesaid, be fixed at the sum of three thousand dollars.

GEO. S. BRYAN,
U. S. Judge, Dist. of So. Ca.

4th Sept., 1879.

We consent to the above order.

A. G. MAGRATH.
BUIST & BUIST.
SIMONTON & BARKER.
MITCHELL & SMITH.

And on the 4th of June, A. D. 1879, came into court the defendant Christopher Hampton, administrator of Frank Hampton, deceased, and filed the following supersedeas bond; which bond is in the words and tenor, following:

No. 22.

Supersedeas bond.

United States of America, district of South Carolina, fourth circuit.

232 J. L. PHIPPS ET ALS.
vs.
THEODORE D. WAGNER, WILLIAM L. TRENHOLM, et als.

Know all men by these presents that we, Charles H. Simonton and Theodore G. Barker, are held and firmly bound unto J. L. Phipps, complainant in above-entitled cause, in the penal sum of five thousand dollars, to which payment well and truly to be made and done, we bind ourselves and each and every of our heirs, executors and administrators, jointly and severally by these presents. Witness our hands and seals, this fourth day of May, A. D. 1879.

Whereas Christopher Hampton, administrator of all and singular the goods, chattels, and estate of Frank Hampton, deceased, one of the defendants in the above-named suit, against whom a decree has been
233 lately rendered by the circuit court for said district, has been allowed the right of appeal from said decree to the supreme court;

And whereas the amount claimed by the said appellant, out of the fund to be detained by said appeal, does not exceed twenty thousand dollars, and is part of a fund in the hands of the special master, subject to be distributed under said decree, and the yearly interest on said sum at the legal rate of seven per centum per annum, amounts to the sum of fourteen hundred dollars yearly:

Now, therefore, the condition of said obligation is such, that if the said Christopher F. Hampton, administrator as aforesaid, shall prosecute to effect his said appeal, and in case of a judgment against him in the Supreme Court *by* the United States, shall pay the costs incident to said
234 appeal and all damages caused by the delay incident thereto, then

the above obligation shall be void and of none effect; otherwise to remain of full force and virtue.

CHARLES H. SIMONTON. [SEAL.]
THEODORE G. BARKER. [SEAL.]

Signed, sealed, and delivered in presence of—
[SEAL.] D. B. GILLILAND,
Notary Public.

Approved.

HUGH L. BOND,
Ct Judge.

And on the 8th day of September, A. D. 1879, came into court the defendants Maria C. Otis and Emma S. Welsman, executrixes of James Welsman, deceased, and filed the following supersedeas bond, which bond is in the words and tenor following:

No. 23.

Supersedeas bond.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

235 J. L. PHIPPS ET AL.
vs.
THEODORE D. WAGNER, WILLIAM L. TRENholm, ex'or, et al.

Know all men by these presents that we, Wilmot G. DeSaussure and Arthur P. Otis, of Charleston, in the State of South Carolina, are held and firmly bound unto J. L. Phipps, complainant in the above-entitled cause, in the penal sum of three thousand dollars, to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-ninth day of July, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas Maria C. Otis and Emma S. Welsman, executrixes of
236 the last will and testament of James Welsman, deceased, two of the defendants in the above-named suit, against whom a decree has been lately rendered by the circuit court for said district, have been allowed the right of appeal from said decree to the Supreme Court; and whereas the amount claimed by the said appellants out of the funds to be detained by said appeal does not exceed sixteen thousand six hundred and fifty dollars, and is part of a fund in the hands of the special master, subject to be distributed under the said decree, and the yearly interest on said sum at the legal rate of seven per centum amounts to the sum of eleven hundred and sixty-five dollars and fifty cents yearly:

Now, therefore, the condition of the above obligation is such,
237 that if the said Maria C. Otis and Emma S. Welsman, executrixes as aforesaid, shall prosecute to effect their said appeal, and in case of a judgment against them in the Supreme Court of the United States

shall pay the costs incident to said appeal, and all damages caused by the delay incident thereto, then the above obligation shall be void and of none effect; otherwise to remain of full force, virtue, and effect.

WILMOT G. DESAUSSURE. [SEAL.]
A. P. OTIS. [SEAL.]

Signed, sealed, and delivered in presence of—
JAS. P. LESESNE.

I approve the form, amount, & sureties of the within bond.

GEO. S. BRYAN,
U. S. Judge, Dist. of So. Ca.

4TH SEPT., 1879.

And on the 20th day of April, A. D. 1880, came into court the solicitors in the cause and filed the following agreement as to what the transcript of the record should contain in the above cause sent up to the supreme court, which agreement is in the words and tenor following:

No. 24.

Agreement.

238 UNITED STATES OF AMERICA,
Fourth Circuit, South Carolina District:

J. L. PHIPPS & CO. ET AL.
vs.
THEODORE D. WAGNER, WILLIAM L. TRENHOLM, et al. } In equity.

Bill as amended.
Judgment pro confesso.
Answer of C. F. Hampton, adm'r.
Answer of ex'ors, James Welsman.
Answer of ex'ors, James T. Welsman, as amended.
Answer of Wm. L. Trenholm, ex'or, George A. Trenholm.
State that Mrs. Trenholm's answer was filed and date of filing.
Replication.
Exceptions of C. F. Hampton, adm'r, 6 May, 1878.
Order overruling these exceptions.
Order of reference, 6 May, 1878.
Report, with testimony of special master, 30 January, 1879.
Exceptions of C. F. Hampton, adm'r.
Exceptions of ex'ors of James Welsman.
Memorandum of agreement between George A. Trenholm and James T. Welsman.
239 Mortgage of James T. Welsman to George A. Trenholm.
Mortgage of George A. Trenholm to James T. Welsman.
Order for sale, 3 March, 1879.
Order 29 May, 1879.
Notice of appeal in open court by C. F. Hampton, adm'r, and ex'ors of James Welsman.

Order 4th Sept., 1879.

Appeal bond C. F. Hampton, adm'r.

Appeal bond ex'ors of James Welsman.

We agree that the above-stated papers shall constitute the brief for the transcript of record in the appeal by C. F. Hampton, adm'r, and the ex'ors of James Welsman to the Supreme Court of the United States in the above-entitled case.

MITCHELL & SMITH.
A. G. MAGRATH.
DESAUSSURE & SON.
H. C. YOUNG.
HENRY A. DESAUSSURE.
BUIST & BUIST.
SIMONTON & BARKER.
SIMONS & SIEGLING.
CAMPBELLS & WHALEY.

240, 241, 242 No. 26.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In circuit court.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing one hundred and seven (107) pages of printed matter and one hundred and thirty-four pages of written matter (134) does contain a true copy of a portion of the record and proceedings (as agreed upon by counsel in the cause) in the said circuit court in the cause of J. L. Phipps et al., complainants, against Theodore D. Wagner, William L. Trenholm, et al., defendants, now on appeal from the circuit court to the Supreme Court of the United States.

Given under my hand and seal of said court, at clerk's office, in the city Charleston, this 28th day of April, A. D. 1880.

[SEAL.]

J. E. HAGOOD,
C. C. C. U. S., Dist. of S.C.

(Indorsement on cover:) No. 218. Christopher F. Hampton, administrator of Frank Hampton, deceased, and Maria C. Otis and Emma S. Welsman, executrixes of James Welsman, deceased, appellants, vs. J. L. Phipps. South Carolina C. C. U. S. Filed 1st May, 1880.

(Stamp:) Office Supreme Court U. S. Filed May 1, 1880. D. W. Middleton, clerk.

108-260

FILED
NOV 14 1882
JAMES H. McKENNEY, Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

CHRISTOPHER F. HAMPTON, ET. AL.,
vs.
J. S. PHIPPS.
} No. 218.

APPEAL FROM THE CIRCUIT COURT OF SOUTH CAROLINA.

MOTION TO DISMISS.

Now comes the appellee, by James Lowndes, his attorney, and moves to dismiss the above entitled appeal on the grounds:

1. That the decree appealed from is not final.
2. That certain parties to the cause have not been summoned, and have not severed or done any act equivalent thereto, and have not been cited as appellees.

JAMES LOWNDES,
Attorney for Appellee.

Please take notice that the above motion will be made on the first Monday in December next, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

JAMES LOWNDES,
Attorney for Appellee.

To Simonton & Barker, Attorneys for C. F. Hampton, Administrator, Appellant; DeSaussure & Son, Attorneys for Maria C. Otis and Emma S. Welsman, Executrixes, Appellants.

Statement of Facts.

Theodore D. Wagner and W. L. Trenholm executed certain bonds—described in the proceedings as "B" bonds. G. A. Trenholm and James T. Welsman guaranteed the payment of these bonds. On the 3d May, 1869, G. A. Trenholm and James T. Welsman covenanted with each other that, as between themselves, George A. Trenholm should pay four-sevenths of the bonds, and James T. Welsman three-sevenths of them, and executed mutual mortgages to secure these covenants. C. F. Hampton, on the 19th June, 1869, recovered a judgment against G. A. Trenholm and J. T. Welsman, which judgment is a lien on the mortgaged property. G. A. Trenholm, on June 13, 1871, executed a mortgage of part of the said mortgaged property to the executors of James Welsman. G. A. Trenholm died, leaving a widow who was his sole devisee and was entitled to dower in the mortgaged property. James T. Welsman died, leaving his daughter, Caroline Napier Welsman, as his heir at law.

Phipps as owner of some of the B bonds, filed his bill on behalf of himself and other holders of B bonds, to have the said mutual mortgages of G. A. Trenholm and James T. Welsman applied to the benefit of the holders of B bonds. The defendants are:

C. F. Hampton.

The executors of James Welsman.

The executors of James T. Welsman.

The executor of G. A. Trenholm.

The executor of James T. Welsman.

The widow of George A. Trenholm; all of whom have filed answers.

The children of George A. Trenholm.

The child of J. T. Welsman.

The bill has been taken *pro confesso* against the children of G. A. Trenholm.

A general replication was filed.

The cause was referred to a Master, who reported in

favor of the complainant and of Mrs. Trenholm's dower. The holders of "B" bonds were called in to prove their bonds before him, and he reported C. T. Lowndes & Co. and the Charleston Gas Light Company to be holders of such bonds.

On March 3, 1879, a consent order of sale was made. No report of sales appears in the record.

On May 29th, 1879, a decree was made confirming the report and ordering the Master to distribute the fund among the bondholders in proportion to their bonds, but directing no distribution to be made to C. T. Lowndes & Co. and the Charleston Gas Light Company.

Argument on the Motion to Dismiss.

I. The decree is not final.

This is clearly so, because it expressly reserves the right of C. T. Lowndes & Co. and the Charleston Gas Light Company.

The bill being a creditor's bill, and C. T. Lowndes & Co. and the Gas Light Company having proved "B" bonds, they were parties to the suit.

Metford & Tyler, Equity Pleading, 46.

They would have been bound by the decree even if they had not proved bonds.

Ibid, 258.

No exception was taken by any one to the proof of their bonds, and nothing appears on the record to show why these rights were reserved for another decree.

If this decree is appealable, then the complainant may be brought here again on the appeal of C. T. Lowndes & Co., and a third time on the appeal of the Charleston Gas Light Company. He has actually been brought here a second time in this cause by C. T. Lowndes & Co. (See Docket of October Term, 1882, No. 760.)

The decree presents a plain case of doing justice by halves.

II. The appeal is defective in the matter of parties, in that the executor of G. A. Trenholm, the executors of James T. Welsman, and the children of G. A. Trenholm, have not been cited, nor have they been summoned, nor have they done any act equivalent to a severance.

JAMES LOWNDES,
Attorney for Appellee.

108-260

OFFICE SUPREME COURT U. S.
FILED
DEC 4 1882
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

CHRISTOPHER F. HAMPTON, ET AL.,
vs.
J. S. PHIPPS.
No. 218.

Brief of Argument of DeSaussure & Son, Attorneys for Maria C. Otis and Emma S. Welsman, Executrixes, Appellants, on motion to dismiss the Appeal.

Rev. Stat. Sec. 692. Oct. 3, March, 1803, v. 2, p. 244.

An appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court, &c., or of any District Court acting as a Circuit Court, in cases of equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, and the Supreme Court is required to receive, hear and determine such appeals.

Is the decree here, final, as to these appellants.

To constitute a "final" decree in equity, so as to authorize an appeal, the decree should finally determine all matters within the pleadings, so that an affirmance of the decree will end the suit. If this is the effect of the decree, if the rights of the parties are completely determined, it may be regarded as "final," notwithstanding some further steps may be requi-

site before those rights can be effectually separated and distinctly enjoyed.

2 Abbott U. S. Courts and Prac., p. 223.

In construing the word "final" as used in Sec. 25 of the Judiciary Act, 1789, Chief Justice Marshall said:

"The word 'final' must be understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause."

Weston & al., vs. City Co. Charleston, 2 Pet., 464.

In Forgay et al, vs. Conrad, 6 How., 201.

The bill was filed by Conrad, Assignee in Bankruptcy of Banks, against the appellants, Forgay and Weeks, Banks, the bankrupt, and three others. Its object was to set aside sundry conveyances of land and slaves, made by Banks, and charged to be fraudulent: And for an account of rents and profits. The decree declared sundry of the deeds fraudulent, and directed the property conveyed by them to be delivered up to the complainant, and directing one of the defendants to pay a certain sum of money, received from the bankrupt in fraud of his creditors; that the complainant have execution; the decree then directs an account of rents and profits, &c. Among the deeds set aside as fraudulent, was one from the bankrupt, of certain lands and slaves, to Ann Wells, and which she afterwards conveyed to Forgay. The appeal was taken by Forgay and Wells, and they alone were interested in that portion of the decree last mentioned. The bankrupt and the three other defendants have not appealed. These defendants claimed other property, which had been conveyed to them at different times and by separate conveyances, as mentioned in the proceedings. It was not, therefore, necessary that they should join in this appeal.

Chief Justice Taney, after stating the case, substantially as above, says:

"The question upon the motion to dismiss is, whether this is a final decree. Within the meaning of the Acts of Congress, undoubtedly, it is not final in the strict, technical sense

of that term. But this Court has not heretofore understood the words 'final decree' in this strict and technical sense, but has given to them a more liberal and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature.

"In the case of Whiting *vs.* the Bank of the United States, 13 Pet., 15, it was held that a decree of foreclosure and sale of mortgaged premises was a final decree, and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order. And this decision is placed by the Court upon the ground that the decree of foreclosure and sale was final upon the merits, and the ulterior proceedings are but a mode of executing the original decree. The same rule of construction was acted on in the case of Mieland and others *vs.* Gerod and others, 4 How., 503.

"The case before us is a stronger one for an appeal than the case last mentioned. For here the decree not only decides the title to the property in dispute and cancels the deeds under which the defendant claims, but also directs the property in dispute to be delivered to the complainant, and awards execution. And according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the Master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the Court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing, within the time prescribed by the rules of this Court, regulating proceedings in equity in the Circuit Courts. If these appellants therefore, must wait until the accounts are reported by the Master, and confirmed by the Court, they will be subject to irreparable injury. For the lands and slaves which they claim will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt before they can have an opportunity of being heard in this Court in defence of their rights. We think, upon sound principles of construction, as well as upon the authority of

the case referred to, that such is not the meaning of the Acts of Congress. And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorises an appeal to this Court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties, pursuant to the decree passed.

Chief Justice Taney, speaking of the Circuit decree in Wabash and Erie Canal *vs.* Beers, 1 Black, 54, defines a final decree as follows:

"The decree is final. It is decisive of the case made upon the record. It is positive, and not alternative. It leaves no question of right between the parties, open for future adjudication.

In Withenbury *vs.* United States, 5 Wall., 819

Withenbury & Doyle, in their claim denied the validity of a capture in a consolidated libel for the condemnation of certain cottons, etc., as prize of war, and in which consolidated libel, various claims were interposed for portions of the property libelled. At the hearing this claim was dismissed, with costs, for which an execution was ordered. A motion was made to dismiss the appeal upon the ground that the appeal was not final.

Chief Justice Chase said:

"It appears from the record that the decree disposed of the whole matter in controversy upon the claim of Withenbury & Doyle. It was final as to them and their rights, and it was final also so far as the claimants and their rights are

concerned as to the United States. It left nothing to be litigated between these parties.

In Thomson *vs.* Dean, 7 Wall., 342.

Chief Justice Chase, in speaking of the particular decree, said:

"So far as the Court below was concerned, the decree in the case determined the principal matter in controversy between the parties. And since the decree could not be changed, except through a new and distinct proceeding, it determined that matter finally."

And then speaking of the prineiple, he says:

"But we think that the current of decisions fully sustains the rule laid down by the late Chief Justice in the case of Forgay *v.* Conrad, and which we again declare in his own language: 'When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this Court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed.'"

New Orleans Railroad *v.* Morgan, 10 Wall., 256, proceeds upon the principle above, viz: That when the appellant is concluded by the decree, it is a final decree as to him.

In Green *v.* Fisk, 13 Otto, 520.

Chief Justice Waite, in considering what is a final decree, said:

"In foreclosure suits it has been held that a decree which settles all the rights of the parties and leaves nothing to be done but to make a sale and pay over the proceeds, is final for the purposes of an appeal. The reason is, that in such a case, the sale is an execution of the decree of the Court,

and simply enforces the rigbts of the parties as finally adjudicated."

Apply the above principles to the present case, and it is submitted that so far as the appellants are concerned, it is a final decree.

The bill is substantially for a foreclosure. See Transcript, fol. 22.

The rights of the appellants are finally adjudicated by the Circuit decree.

See Transcript, fol. 146 to 149, 171 to 179, 225.

It directs the payment of proceeds of sale of the mortgaged property to other parties than the appellants.

See Transcript, fol. 227.

The objection that Lowndes & Co. and the Charleston Gas Light Company may appeal, and actually have appealed (see Docket, October Term, 1882, No. 760), is not a valid one to this appeal.

Lowndes & Co., and the Gas Co., are contesting a distribution of the fund, and claim precedence over the other claimants allowed by the decree.

See their Exceptions, as appears in their Appeal now on file in this Court.

A fund to meet their claim is reserved in the Circuit decree.

See Transcript, fol. 227.

The decree from which these appellants appeal, was made 29th May, 1879. The order or decree in the Lowndes & Co. exceptions, was not made until nearly two years after, viz: 18th April, 1881.

See their Appeal, on file in this Court.

Had these appellants waited for that, their rights would have been seriously jeopardized. And the decree being conclusive, therefore final, as to the rights of these appellants, they were not obliged to wait, and subject themselves to such jeopardy.

The having two appeals now here, may be a reason why the case should fall under the disapprobation and censure expressed in Forgay *vs.* Conrad, &c., but the appellants now before the Court in this present motion can scarcely be held responsible for this.

Is the appeal defective in the matter of parties?

This was a case in Equity. See Transcript.

The appeal was in open Court on the day the decree was rendered. See Transcript, fols. 228, 229.

In Hudgins *vs.* Kemp, 18 How., 534, Chief Justice Taney said:

"The record transmitted to this Court, certified by the Clerk of the Circuit Court, states that the appeal was taken in open Court. This is sufficient evidence of that fact."

In Vansant *vs.* Gas Light Co., 9 Otto, 213, Chief Justice Waite said:

"No citation has been issued in this case. A citation only becomes unnecessary when the appeal is allowed in open Court during the term at which the decree is rendered. This implies some action of the Court while in open session, and, to be regular, should be entered on the minutes."

In Railroad Co. *vs.* Blair, 10 Otto, 661, Chief Justice Waite said:

"The practice only dispenses with a citation when the appeal is taken and perfected in open Court during the term at which the decree complained of is actually entered; and to be technically sufficient, so as to render a citation unnecessary, the taking of the appeal should in some form appear on the records of the Court. The theory of the rule is, that as a party to a suit is constructively present in Court during the entire term at which his cause is for hearing, and as the doings of the Court are matters of record at the time, he is chargeable with notice of all that is done during the term affecting his suit; because, if actually absent when an order is made, he can, on his return, obtain full information by an examination of the minutes. Still, an appeal otherwise regular would not probably be dismissed absolutely for want of

a citation, if it appeared by clear and unmistakable evidence, outside of the record, that the allowance was made in open Court at the proper term, and that the appellee had actual notice of what had been done."

Apply these decisions to this case.

The notice of appeal is given in open Court, on the day on which the decree is rendered, and appears on the minutes, viz: 29 May, 1879.

See Transcript, fol. 228, 229.

The bond of the appellant, Hampton, is filed 4 June, 1879, and approved by the Circuit Judge. See Transcript, fol. 231 to 234.

The bond of the appellants, the executrixes of James Welsman, is not filed until 8 September, 1879; but it is filed under an order of 4 September, 1879, fixing the amount. See Transcript, fol. 230. To this order the attorneys of the appellees consent. See Transcript, fol. 231. The appellees, including the executor of G. A. Trenholm, therefore, had actual notice, and consented through their attorneys. The executrixes of James T. Welsman had notice, because, one of them as attorney for the appellants, moved the order. See Transcript, generally.

"The bill has been taken *pro confesso* against the children of George A. Trenholm." Statement of Facts, p. 2.

It is submitted that all this was sufficient notice or citation.

To the above may be added the agreement filed in Court on 20 April, 1880, as to what should constitute the transcript of record for the Supreme Court, which included the notice of appeal in open Court, the order of 4 September, 1879, and the bonds.

See Transcript, fols. 238, 239.

As regards a severance.

There is no identity of interest on the part of the executors of George A. Trenholm, the executors of James T. Welsman, or the children of G. A. Trenholm, with the appellants in this case, which made an appeal by them necessary, or required an order of severance.

The rule upon this point seems to be that enunciated by

Justice Story, in pronouncing the opinion of the Court in Todd *et al. vs.* Daniel, 16 Pet., 523.:

"The proper rule, in cases of this Court, where there are various defendants, seems to be that all the defendants affected by a joint decree (although it may be otherwise where the defendants have separate and distinct interests, and the decree is several and does not jointly affect all) should join in the appeal; and if any of them refuse or decline upon notice and process (in the nature of a summons and severance in a writ of error), to be issued in the Court below, to become parties to the appeal, then the other defendants should be at liberty to prosecute the appeal for themselves and upon their own account; and the appeal, as to the others, to be pronounced to be deserted, and the decree of the Court below, as to them, to be proceeded in and executed. In the present case, what has occurred is equivalent to such proceedings. All the defendants originally claimed an appeal; some of them have declined to pursue it at all, others have deserted it since it was pending in this Court; and, therefore, there is no pretence to say that any practical inconvenience can occur from Todd's now prosecuting it alone, and since the other defendants have all had notice and declined to interfere, and are content to abide by the original decree."

A reference to the transcript, *passim*, shows that the interests of these appellants are separate and distinct.

See also Sage *vs.* Railroad Co., 6 Otto, 712.

Also, Phil. Prac., 116, and cases in note.

Also, Oliver *vs.* Alexander, 6 P. Pet., 143.

Rich *vs.* Lambert, 12 How., 352.

Stratton *vs.* Jarvis, 8 Pet., 11.

Mussina *vs.* Cavazor, 12 How., 289.

Farrar v U. States 3 Pet. 460

Buckingham v McLean 13 How. 151

Pollard v Dwight 4 Cranch 421

U. States v Yates 6 How: 605

Aldrich v Etna Co 8 Wall. 491

DeSaussure & Son

Attys for Lewis James Weleman Appellants

108-260

OFFICE SUPREME COURT U. S.
FILED
DEC 4 1882
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

CHRISTOPHER F. HAMPTON, ET AL.,
vs.
J. S. PHIPPS. } No. 218.

APPEAL FROM THE CIRCUIT COURT OF SOUTH CAROLINA.

MOTION TO DISMISS.

Brief of Argument of Theodore G. Barker, Esq., Counsel for C. F. Hampton, *Adm'r.*, one of the Appellants responding to the motion.

1. The decree is final.

(*a*). It decided all the issues made in the pleadings between the complainants and the defendants.

It gave to the creditors holding bonds of Theodore D. Wagner and William L. Trenholm the property of George A. Trenholm, and of James T. Welsman, against the claims of the defendants who held liens upon that property.

In pursuance of that decision, it "awarded execution," by ordering the fund, which represented proceeds of sale of the real estate, in contest, to be "forthwith" distributed.

The decree overruled exceptions of defendants to the Master's report, and confirmed said report. It further decrees "that the said special Master do proceed forthwith to pay and distribute the net proceeds of the sales hereinbefore ordered and decreed * * * * * " as follows, viz:

* * That he next pay and distribute the net balance remaining after the reservations hereinafter mentioned *among the bondholders* who have already, or shall before the distribution herein ordered, prove their bonds * * *

* * That the said Master is hereby authorized to sell such other bonds given for the credit portion of the purchase money of the real estate sold herein as he can dispose of, at their par value, and to distribute the proceeds, as herein ordered, and that proper assignments of such bonds and the mortgages securing the same be executed to the purchasers thereof."

Record, p. 105, fols. 225 to 228.

Nothing could stay the execution of this decree, and the payment and distribution of the fund, but an appeal and a *supersedeas*, such as has been taken.

Nothing, as between complainants claiming the fund on the one hand, and the defendants (appellants) claiming the fund, on the other hand, remained to be determined by any *future* decree.

The issue between the complainants and defendant was, as to the appellant, whether the real estate in contest, belonged to the defendant, C. F. Hampton, Adm'r., under the lien of a judgment recovered by him against both Trenholm and Welsman, or whether it should be decreed to the creditors of Theodore Wagner and William L. Trenholm, claiming to be subrogated to an alleged right of James T. Welsman to claim George A. Trenholm's property under an indemnity mortgage, which he had held from Trenholm. Should this appeal be heard and decided, neither these appellants nor any other parties in the cause can ever raise again before this Court the same question by another appeal.

(*b*). As C. T. Lowndes & Co. appear in the cause only as creditors suing with Phipps, as complainant, the above issues

were finally decided as between the appellants and C. T. Lowndes & Co., as completely as they were between the appellants and Phipps, and the decree is equally final and complete against the appellants and in favor of C. T. Lowndes & Co., one of the creditors, complainants in the suit, as it is in favor of Phipps and all the other creditors, complainants.

The reservation of the questions raised by C. T. Lowndes & Co. as between themselves and other complainants, does not make the decree less final and complete *as against the defendants in the cause.*

That issue is one between C. T. Lowndes & Co., and his co-plaintiffs, affecting the distribution of the fund among themselves in case the decree is affirmed, and in that issue these appellants have not interest or concern. It is aside from the issues made in the pleadings, and arises only after decree allotting the fund to the complainants.

If these appellants claiming the fund had been compelled to stand by and see the fund "forthwith" paid out and distributed, under the decree, and to wait for their appeal until after the determination of all questions among complainants which might arise in the course of distribution in pursuance of the decree, they would have been exposed to irreparable injury.

It is said on behalf of complainant, that "if this decree be appealable the complainant may be brought here again on the appeal of C. T. Lowndes & Co., and a third time on the appeal of the Charleston Gas Light Company." If this be so, it will not be on appeals between *the same parties*, nor involving *the same* subject matter, nor requiring the Court to decide *the same* question, as is raised *by this appeal.*

If there be hardship in it, the complainant cannot object, for it was on his motion that the exceptions of C. T. Lowndes & Co. to the Master's Report were reserved in the decree for a future hearing, and the issues between the exceptors and other complainants were made the subject for a separate judgment and appeal.

II. The decree is appealable.

"* * One of the most striking and distinctive features of Courts of Equity is, that they can adapt their decrees to

all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest. * * "

Story Eq. Juris., § 28.

"In all cases of this kind (creditor's bill) each creditor is entitled to appear before the Master, and may there, if he chooses, contest the claim of any other creditor in the same manner as if it were an adversary suit.

Story Eq. Juris., § 547.

"When a decree is made as to one of several defendants whose interests are not at all connected with each other with a direction for the payment of costs as to that defendant, such decree is *final as to him*, although the cause may still be pending in Court as to the others."

2 Daniel Ch. Pl. & Pr., p. 1199, Note (1).

2 Am. and 2 Engl. Edition (1851) of Perkins.

Still more when made as to all the defendants, and in favor of all the complainants in the cause, with a direction of execution disposing of the subject matter of suit, and this although the fund may remain in Court for distribution *among complainants*.

"Although the general rule of the Court is to make a complete decree upon all the parties connected with the case, it frequently happens that the parties are so circumstanced, that a decision upon all the points connected with their interests cannot be pronounced till a future period." * *

"The same sort of liberty" (to apply to the Court after decree) "is also given in any other case in which it may seem requisite; and it is to be observed that the effect of it is not to alter the final nature of the decree. A decree with such a liberty reserved is still a final decree, and when signed and enrolled may be pleaded in bar to another suit for the same matter."

Ibid, 1203.

Mr. Daniel discussing "enrolment of Decrees," says:

" * * The question whether a decree to account can, according to the practice, be enrolled or not, must depend on

the nature of the decree; * * if * * the direction to account is either, in itself, a *declaration of the rights of the parties*, or is consequent upon such declaration, then it appears to be consistent with justice and common sense, that the party benefitted by the decree should have it in his power to enroll it, *for it is in fact a final decision of the question as it affects that party* * * . From what has been said, it may be collected that all decrees, *which are final in their nature*, i. e., *which amount to the determination of the question, in the cause*, may be enrolled ; and the same rule will apply to all decretal orders where they are conclusive of any of the rights of the parties to the cause."

Ib. 1,224.

This Court has held,

In *Forgay et. al., Conrad 6, How. 201*, by Ch. J. Taney, that " where the decree decides the right to the property in contest and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution the decree must be regarded as *final to that extent*, and authorizes an appeal to this Court although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the account between the parties pursuant to the decree passed."

In *Withenbury vs.* United States, 5 Wallace 819, (by Ch. J. Chase) where several libels were filed for condemnation as prize and consolidated into one cause, various claims interposed for portions of the property libelled, among them that of W. & D.; upon hearing of the cause as to this claim, an order was made dismissing the claim with costs, &c.

From this decree *three appeals* were taken *separately*, and a motion to dismiss was made, as to one of the appeals upon the ground that the decree was not final.

It was contended for the motion, that " no disposition has yet been made of the libel, or of the cotton, or its proceeds," that " the suit still remains pending in the District Court," and the cases of *Huniston and Stainthorp, 2 Wallace, 106*, of

the "*The Palmyra*" *10 Wheaton, 502*, were cited. But said the Court, by Ch. Justice Chase:

"It appears from the record, that the decree disposed of the whole matter in controversy upon the claim of Withenbury & Doyle. It was *final as to them and their rights*, and it was final also, so far as the claimants and their rights are concerned, as to the United States. It left nothing to be litigated between these parties. It awarded executions in favor of libellants against the claimants." (After noting that the Court had already entertained two appeals arising out of the same cause, out of which the appeal in question had arisen, he says:)

"In neither of these cases had all the matters arising upon the libels and the claims been finally disposed of."

In *Thomas vs. Dean*, *7 Wallace, 342*, (by Ch. J. Chase);

"But it is insisted that this Court has held that no decree which does not completely dispose of the whole case is final, and that this decree, though disposing completely of the controversy as to the ownership of the stock, is not final, because it directs certain accounts to be taken. * * * We think, that the current of decisions fully sustains the rule laid down by the Chief Justice in *Forgay vs. Conrad*, and which we again declare, in his own language * * And it is quite clear that the appeal under consideration is within the rule. The decree from which it was taken decided the right of property in contest, directed it to be delivered by defendant to complainant by transfer, entitled the complainant to have the decree carried into immediate execution, leaving only to be adjudged accounts between the parties, in pursuance of the decree settling the question of ownership."

In *Stovall vs. Banks*, 10 Wallace, 583, (by Mr. Justice Strong.)

"It cannot be maintained that a decree which adjudges a certain sum of money to be due from defendant to the complainant, and awards execution to collect it, is not a final decree conclusive upon the parties. * * Even if the sum decreed was left undetermined, it was certainly adjudicated that the complainants were entitled to participate in the distribution and the extent of their interests was defined.

Is is not unusual for Courts of Equity to enter decrees de-

termining the right of parties and the extent of liability of one party to the other, giving at the same time a right to apply to the Court for modification and directions. It has never been doubted that such decrees were final."

In *Sage vs. R. R. Co., 93 U. S. R. (3 Otto)*, 412, by Ch. Justice Waite:

"The appellants by the order of January 14 became parties to the suit for the purposes of an appeal. This order having been made at the same term in which the decree was entered was within the power of the Court, and although it does not appear whether they were admitted as plaintiffs or defendants, it was sufficient to enable them to prosecute an appeal for the protection of their interests. Under this authority their appeal has been allowed, and perfected. Whether this brings up the whole case or only a part, it is not necessary now to consider. It is clear that these parties have been allowed their appeal, and that the case is here *to the extent that it is necessary for the protection of their interests.* It is their separate appeal within the rule as to the form in which a severance may be obtained, which is laid down in *Masterson vs. Herndon, 10 Wallace, 416.*"

This appeal is not in conflict with the rule in *Masterson vs. Herndon, 10 Wallace, 416.* There the Court say (by Mr. Justice Miller): "It is the established doctrine of the Court, that in cases at law *where the judgment is joint*, all the parties, *against whom it is rendered*, must join in the writ of error; and in chancery cases, all the parties against whom a *joint decree* is rendered must join in the appeal, or they will be dismissed."

The defendants, C. F. Hampton, administrator, and the defendants, executors of Welsman, against whose separate claims the decree has pronounced in favor of complainants, *have united in this appeal*, although their interests are really not joint, and the decree cannot be said to be, as to them, *a joint* decree. No objection on this ground can be made, under the rule, as above laid down, against this appeal.

Neither does this appeal conflict with the reasons assigned for the rule in *Masterson vs. Herndon.* These are two, viz:

1. "That the successful party may be at liberty to proceed

in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed; and

2. That the appellate tribunal shall not be required to decide a second or third time *the same question* on the same record."

III. "The appeal" (it is said) "is defective in the matter of parties, in that the executors of G. A. Trenholm, the executors of James T. Welsman, and the children of G. A. Trenholm, have not been cited, nor have they been summoned, nor have they done any act which is equivalent to a severance."

(*a.*) As to parties not being *cited.*

No one has been cited. The appeal was taken and allowed in open Court, at the same term ~~and on the same day on~~ at which the decree was entered (Record, p. 105, fol. 228), and the above named parties were present, by their counsel, and received notice, making citation unnecessary.

The decree expressly states:

"This cause having come on to be heard on the report of the special Master, Samuel Lord, Jr., herein filed, and the exception to the same, and *counsel on all sides having been heard*, &c." (Record, p. 105, fol. 225.) The same day, 29th May, 1879, notices of this appeal were given in open Court. (Record, *Ib.*, fol. 229.)

And at the same term, viz: on the 4th June, 1879, in open Court, the appeal of C. F. Hampton, administrator, was perfected by the filing of the supersedeas bond, and the order of the Circuit Judge *approving* the same.

In *Sage vs. R. R. Co.*, 96 U.S. R., p. 712, it was said by Ch. J. Waite:

"If the security given and accepted in open Court during the term at which the decree appealed from is recorded, no citation is necessary, because the parties, being presumptively present during the whole term, are charged with notice of all that is done affecting their interests. Whenever, therefore, security for an appeal is accepted during the term, an appeal is allowed."

THEODORE G. BARKER,
for C. F. Hampton, Appellant.

108-260

OFFICE SUPREME COURT U.S.
FILED
MAR 13 1883
JAMES H. McKENNEY, Clerk.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

No. 218.

CHRISTOPHER F. HAMPTON, ADM'R OF FRANK HAMPTON, ET AL., APPELLANT,

vs.

J. L. PHIPPS, APPELLEE. 1

APPEAL FROM THE CIRCUIT COURT OF SOUTH CAROLINA.

BRIEF OF THEODORE G. BARKER, FOR C. F. HAMPTON, ADM'R, APPELLANT.

2

STATEMENT OF FACTS.

In 1867, the houses of John Fraser & Co., of Charleston, So. Ca., and of Fraser, Trenholm & Co., of Liverpool, England, failed.

In settlement with the creditors of these firms, Theodore D. Wagner and William L. Trenholm, two of the co-partners, residing in Charleston, S. C., executed three classes of bonds to James Robb and Charles T. Lowndes, as trustees, all of which were, by endorsement of the trustees, made payable to bearer, and distributed to creditors.

The bonds called A bonds were secured by mortgage, to 3

the trustees, of the real estate of John Fraser & Co. They are not involved in this suit, and are referred to only in explanation of other bonds, issued under the same settlement.

The bonds called B bonds, bearing date 1st January, 1868 were executed by Theodore D. Wagner and William L. Trenholm to the same trustees. *Upon each of these bonds, George A. Trenholm and James T. Welsman endorsed their joint and several guaranty.* The amount secured by B bonds, thus
4 guaranteed, was $710,000.

In November, 1868, a supplemental agreement between Theodore D. Wagner and William L. Trenholm and the creditors was made, under which bonds, called C bonds, were executed by Theodore D. Wagner and William L. Trenholm, to meet a special deficit of assets, amounting to $101,448, which also were jointly guaranteed by George A. Trenholm and James T. Welsman, and are described as "other obligations."

George A. Trenholm and James T. Welsman being thus liable, as co-sureties, upon obligations of Theodore D. Wagner
5 and William L. Trenholm, on 3d June, 1869, executed an agreement in writing with each other, entitled "Memorandum of Agreement between George A. Trenholm of the one part, and James T. Welsman of the other" (transcript fol., 179), by which they covenanted with each other, that, "as between themselves," George A. Trenholm should be liable for $400,000, only, of the $710,000 of B bonds, and James T. Welsman for $310,000, and no more, of said sum; and that of the "C" bonds—described in the memorandum as "other obligations"—George A. Trenholm should be liable for forty, seventy-one,
6 parts thereof, and James T. Welsman for thirty, seventy-one, parts thereof; and that each would indemnify and hold harmless the other against any claim "beyond the amount or proportion by each respectively assumed," and to secure to each other the performance of these mutual covenants of indemnity, they executed each to the other a mortgage of their separate real estate.

On the 19th June, 1869, Ch. F. Hampton, as administrator of Frank Hampton, recovered, in the United States Circuit Court of South Carolina, a judgment for $169,043.25-100
7 against George A. Trenholm, on his bond given to Frank

Hampton, in his lifetime, and a judgment for a like amount against James T. Welsman, who had guaranteed said bond of George A. Trenholm. These judgments became liens from their date of entry on all the property of George A. Trenholm and James T. Welsman in South Carolina.

At the date of the Report of the Special Master, $531,616., 61-100 had been paid on account of B and C bonds, of which $423,162.16-100 had been paid, out of proceeds of assets of Theodore D. Wagner and William L. Trenholm, the obligors; 8
and $108,454.45-100 had been paid by George A. Trenholm, as guarantor. Welsman had paid nothing. By the payments made, all of the C bonds had been retired, and there remained due on the outstanding B bonds, $464,846.

George A. Trenholm died 17th November, 1876.

James T. Welsman died 7th July, 1877.

J. L. Phipps, as owner of some B bonds of Theodore D. Wagner and William L. Trenholm, filed his bill, on behalf of himself and other holders of B bonds, claiming that the mutual mortgage deeds of real estate of George A. Trenholm to James 9
T. Welsman, and of James T. Welsman to George A. Trenholm, "enured to the benefit of the holders of the said bonds or obligations, by way of security for the payment of the same; and that said bonds became a lien upon the said real estate to the extent of the amount due thereon, with interest, and that such holders of B bonds were entitled to be paid out of the proceeds of said real estate, in precedence of the creditors of George A. Trenholm and James T. Welsman holding liens upon the same—and praying foreclosure of said mortgages and sale of the property. 10

Ch. F. Hampton, administrator of Frank Hampton, being made a party as a judgment creditor of George A. Trenholm and of James T. Welsman, holding a lien upon their real estates, answered, denying the claim of Phipps and the jurisdiction of the Court on the complainant's bill against him.

An order of reference was made, under which holders of B and C bonds of T. D. Wagner and W. L. Trenholm were called on to prove their claims—and the executors of George A. Trenholm and James T. Welsman were ordered to account.

Defendant, Ch. F. Hampton, Admr., excepted to this or- 11

Charleston

der, on the ground "that the Circuit Court of the State of South Carolina, for ~~Chester~~ County, had already acquired jurisdiction of the estate of George A. Trenholm, including the subject matter of, and parties to, this case, and that the Circuit Court of the United States had no jurisdiction to grant the order." Also, that "complainant has not established, by his bill, the basis of equitable jurisdictoin, and cannot compel defendant to answer." These exceptions were overruled, and
12 the case was tried before the Special Master, who made his report to the Circuit Court. On 3d March, 1879, a consent order of sale was passed, with this provision: "This order to be without prejudice to any claim or claims of priority of lien asserted by any of the parties to this cause, and that all the rights and equities be, and are hereby, transferred from the property ordered to be sold to the proceeds which shall arise from such sales." Under this order the property was sold.

The Special Master held, that the mortgages given to secure the mutual covenants, between George A. Trenholm and
13 James T. Welsman, and for their mutual indemnity, were not intended to secure to the creditors of Theodore D. Wagner and William L. Trenholm, payment of the bonds executed by them, and that the B bonds did not become a lien upon the mortgaged premises of George A. Trenholm and of James T. Welsman, as was claimed in the bill. But, the Special Master held, that the holders of B bonds "could be subrogated to the rights of their debtors," and could "assert a *quasi* lien by administering the equities between Welsman and George A. Trenholm."

14 That "the parties" to the mutual mortgages, by an endorsement, placed by Welsman in 1873, on some B bonds, which George A. Trenholm had paid, "had given a practical construction to the contract" (of 1869). That the endorsement of Welsman "clearly recognizes the Welsman mortgage as security on the bonds of Trenholm and his assigns for Welsman's proportion of the money so advanced by Trenholm to pay these bonds, though the amount fell short of $400,000." That "the mortgage of Trenholm * * * was intended to stand as security to Welsman, absolutely for that proportion of the bonds which Trenholm had assumed to pay, and
15

to this extent could be enforced by the bond-holders." That Trenholm's estate was still liable to pay, according to a calculation made in the report, $214,532, and that to that extent, the bond-holders could, through Welsman's equity against Trenholm, charge the estate of *George A. Trenholm*, and take precedence of Trenholm's own judgment and lien creditors.

The Special Master assumed the total insolvency of Theodore D. Wagner, and of William L. Trenholm, the obligors, 16
(This had not been judicially determined by suit on the bonds, or otherwise.) He then made a calculation of the total amount which, under his construction of the agreement, would be the subject of contribution between the guarantors (assuming that the estates of George A. Trenholm, and of James T. Welsman, *would* be called upon to pay the deficit of B bonds outstanding.) By adding to such deficit ($464,846) the amount which *had already been paid* by George A. Trenholm, $108,454.45, he stated the total amount which the Sureties have to pay to be, $573,300. He then divided this 17
sum between the estate of George A. Trenholm and James T. Welsman, in the proportion of forty, seventy one, parts, and thirty-one, seventy-one, parts, borrowing that proportion from the agreement under which they had, in 1869, agreed to divide the *total* liability between them, and applying it to the liability *of the guarantors, as above calculated*, he found, that after giving credit to George A. Trenholm, for $108,454.45, paid by him, his "estate would be liable to *contribute* $214,532, and the estate of Welsman would be liable to *contribute* $250,-
314 of the $464,846, still due on B. bonds. 18

And he held, that Welsman, who had paid nothing, had *not* overpaid the amount he had agreed to pay, and who would owe George A. Trenholm, *in contribution*, as calculated above, more than George A. Trenholm would owe him, *yet* had an "equity" against George A. Trenholm's estate, for the above sum of $214,532, for which sum the creditors of Wagner and Wm. L. Trenholm, could charge George A. Trenholm's estate, through Welsman's alleged equity.

Exceptions to the report were taken by defendant, which exceptions the Circuit Judge overruled. 19

ASSIGNMENT OF ERRORS.

Appellant assigns for error to the decree of the Circuit Court, that the decree confirmed the report of the Special Master, and overruled the exceptions, which were, among others, as follows:

20 FIRST. To so much of the report as finds that the mortgages of George A. Trenholm to James T. Welsman, and of James T. Welsman to George A. Trenholm are conditioned, not for the indemnity of Trenholm and of Welsman, each to the other, but "for the performance of the covenants and agreements, and understanding contained in the memorandum of agreement, bearing even date with the mortgages," and "that Trenholm should be liable for the full discharge of $400,000 and Welsman for the full discharge of $310,000 of the guaranteed bonds."

21 SECOND. As admits in evidence the endorsement by Welsman, in January, 1873, upon the bonds paid by Trenholm, and upon such evidence finds, that such "endorsement clearly recognizes the Welsman mortgage as a security in the hands of Trenholm and his assigns for Welsman's proportion of the money advanced by Trenholm to pay these bonds, though the amount fell short of $400,000;" because (1) such endorsement, if of any effect in giving Trenholm a claim upon Welsman's property, could not enlarge the previous claim of Trenholm under the mortgage of Welsman, nor give such claim prece-
22 dence over a previous judgment creditor of Welsman; because (2) such endorsement, in 1873, is proof only of Welsman's then acknowledgment, from which the intention of the parties to the Welsman-Trenholm mortgage of 1859 cannot properly be inferred, and, as proof of intention, cannot be resorted to in construing the express terms of the deed; because (3) the acknowledgment of Welsman by his said endorsement is the admission of his liability as co-guarantor with Trenholm to contribute to the payment of the bonds of Trenholm, and is nothing more, and that the Special
23 Master erred in holding that by such endorsement, in 1873,

four years after the date of the mortgages, the parties to the mortgages have given a practical construction to the mortgages by which the Court is governed.

THIRD. To so much of the report as holds, that the bondholders, who sue in this case, can charge the property of George A. Trenholm, under his mortgage to James T. Welsman, with the sum of $214,532. *Because*, the report correctly holds, that the creditors can only claim through Welsman's equity for contribution against Trenholm, and, upon the undisputed facts of the case, Welsman has no such equity, inasmuch as he has wholly failed to pay his proportion of the bonds guaranteed; and his estate being insolvent, he can never pay his share, viz: the $310,000 assumed by him, and he, if alive, could never have such equity. 24

So likewise Trenholm having failed to pay his proportion had no equity against Welsman, for contribution under the mutual agreement.

FOURTH. That the lien of the Hampton judgment for an antecedent debt was perfect in 1869, binding, from and after the date of its rendition, in June, 1869, all the property and rights of Trenholm and of Welsman, and cannot at law or in equity be postponed to the claim of Trenholm against Welsman, or of Welsman against Trenholm, arising out of any equity between them. 25

That, assuming that the mortgage of Trenholm to Welsman could bind the land in equity against the claim of an antecedent creditor of both the mortgagor and mortgagee, (whose claim was in suit and stood for trial in May, 1869, when the mortgages *inter sese* were executed,) so as to subject the land of Trenholm to the payment of contributions and indemnity to become due by Trenholm to Welsman in the future, still such charge in favor of Welsman upon the property of Trenholm was an *interest or estate of Welsman* the moment it was created, and as such was bound by the lien of the Hampton judgment from the beginning. 26

FIFTH. That if Trenholm, by virtue of the mortgage of Welsman to him, acquired a right to charge Welsman's land for contribution, such right was an *interest or estate of Trenholm*, 27

which became bound from its birth, by the Hampton judgment vs. Trenholm.

That, being so bound, Trenholm could not, if he had any claim for contribution at all, subject the land of Welsman to the payment of his indemnity without first discharging the debt of Welsman to Hampton under the judgment. So, if the mortgage of Trenholm to Welsman gave Welsman a legal or equitable interest in or claim upon Trenholm's land,
28 the creditor of Welsman, before he could by subrogation or substitution take the place of Welsman as against Trenholm's estate, must first do what Welsman would have to do, pay off the incumbrance at law and discharge the superior claim in equity of the antecedent judgment creditor of both himself and Trenholm before he could avail himself of the security.

SIXTH. That, if, at the date of Trenholm's death, Welsman had any equity for contribution or claim for indemnity against
29 Trenholm, such equity, according to the law of South Carolina, would be postponed in the order of payment of the debts of Trenholm's estate to the claim of a judgment creditor of Trenholm. So, if at the date of Welsman's death Trenholm had an equity for contribution or claim for indemnity against Welsman, such equity, according to the law of South Carolina would be postponed in order of payment of the debts of Trenholm's estate, to the claim of the judgment creditors of Trenholm.

30 SEVENTH. That the lien of the Hampton judgment is a claim upon the lands of Trenholm and of Welsman, anterior to the claim of either under the mortgages of the other, and adverse to the title of the mortgagors, and cannot be tried in this foreclosure suit.

Appellant assigns, as additional error in the decree of the Circuit Court, that,

EIGHTH. The decree appropriates to the payment of creditors of Theodore D. Wagner and William L. Trenholm, not a
31 security or fund given by the principal debtors to their sure-

ties, George A. Trenholm and James T. Welsman, for their protection, but a private security given by one of these two co-sureties to the other, under a separate and private covenant between themselves, to which neither the principal debtors nor the creditors were privy.

NINTH. The decree gives to the creditors of the debtors "through the equities of the sureties," that which neither of the sureties could have had under the agreement if they had 32
paid the whole deficit of the guaranteed debt.

TENTH. The decree forecloses, at the instance of a creditor of Theodore D. Wagner and William L. Trenholm, a mortgage given by George A. Trenholm to James T. Welsman, and a like mortgage given by James T. Welsman to George A. Trenholm, said mortgages not having been assigned at law, or in equity, to the complainant

ELEVENTH. The decree, by neccessary implication, assumes 33
for the purpose of such foreclosure, that the conditions of the mortgage given by George A. Trenholm to James T. Welsman, to secure his covenant to indemnify Welsman, in case he should be made to pay more than $310,000, against such over payment, has been broken, by Trenholm's assumed failure, to make good to Welsman a supposed loss by an over payment, and that the mortgaged property of George A. Trenholm has thus become forfeited to Welsman, in face of the admitted fact that Welsman has not paid one dollar over said sum, giving him a claim for over-payment, but, on the contrary, he 34
has paid nothing of the sum he agreed with George A. Trenholm to pay, and has in no way been damnified

The decree, in like manner, assumes for, the purpose of said foreclosure, that the condition of the mortgage given by James T. Welsman to George A. Trenholm securing the covenant of Welsman to indemnify George A. Trenholm, against loss by his being made to pay more than $400,000, (his agreed share), has been broken by Welsman's assumed failure to make good Trenholm's supposed loss by over-payment, beyond said sum, and that the mortgaged property of Welsman has thus be- 35

come forfeited to George A. Trenholm, in face of the admitted fact, that of the $400,000 which Trenholm agreed to pay, he has paid only $108,454, has not over paid his agreed proportion, and has in no way been damnified.

TWELFTH. The report, erroneously assuming that Welsman had an equity against George A. Trenholm, and Trenholm a like equity against Welsman, incorrectly applies the rule of
36 avoiding circuity of action in laying hold of the mortgages and applying them to the benefit of the creditors of Wagner and William L. Trenholm.

BRIEF OF THE ARGUMENT.

POINT FIRST.

The report of the Special Master misconstrues the mutual mortages given respectively by George A. Trenholm and
37 James T. Welsman, in holding that they are conditioned, not for the indemnity of Trenholm, and of Welsman, each to the other simply; but for the absolute payment of $400,000 and $310,000 respectively, and in extending their force and effect beyond the express terms of the mortgage deeds.

The terms of the mortgages, as well as the terms of the "memorandum between George A. Trenholm and James T. Welsman," for the performance of the covenants, agreement and understanding, contained in which memorandum the mortgages were given, (in 1869), are both very clear.

38 In the "memorandum of agreement" (Transcript, fol. 179), the language of the recital as to the B. bonds, is (fol. 183), in these words:

"And whereas the said George A. Trenholm and James T. Welsman in being bound by the said guaranty, and endorsement, * * * did between themselves agree, that the limit and extent, of the amount for which each of them would respectively be liable, should be as follows: That is to say, of the said sum of $710,000, that the said George A. Trenholm should be liable for the sum of $400,000, and the said James
39 T. Welsman for the sum of $310,000, and that in the obliga-

tion to be given under the second article, * * * the said George A. Trenholm should be liable for forty seven-one parts thereof, and the said James T. Welsman should be liable for thirty-one seventy-one parts thereof; and the said George A. Trenholm and James T. Welsman have become parties to such guaranty and endorsement, and have executed such other obligation with the clear understanding that each would be respectively liable to the other for a full discharge of the said sum, and the said proportion by them respectively undertaken, and that each would save and keep harmless and indemnified the other from all claim, demand and damage for or by reason of the said guaranty and endorsement and of such obligation, beyond the amount or proportion by each respectively assumed as hereinbefore stated; and whereas the said George A. Trenholm and James T. Welsman have in all respects, and from the creation of such liability on them respectively, fully and in good faith intended to keep each other indemnified from all claim, demand and damage; and in further pursuance thereof did agree, by proper conveyances, by way of mortgages, or otherwise, if so advised, to transfer each to the other such property to them respectively belonging, as would secure each other from all claim, demand and damages as hereinbefore stated. * * *

After this recital followed these words, in the conclusion of said "Memorandum," to wit, (fol. 185).

"Now, therefore, the said George A. Trenholm and James T. Welsman do, severally and each, by his execution of these presents, agree and declare that all that is hereinbefore recited and set forth, fully and truly recites and sets forth the understanding and agreement made and now subsisting between them in relation to said guaranty and endorsement, and other obligation, by them made, and particularly that it does fully and truly recite and set forth the amounts and proportions for which each, as to the other, is respectively liable, because of said guaranty and endorsement, and the said obligation, by them made and undertaken, and that each is, as to the other, bound fully to discharge and satisfy such amount and such proportion as is hereinbefore recited and set forth, as so undertaken by each as the amount and proportion

for which he is liable, and that each will save and keep harmless and indemnified the other, from all claim, demand and damage, for or by reason of the amount so undertaken by him. And the said George A. Trenholm and James T. Welsman do further agree that, at any time when either of them shall so require, each shall, by proper conveyance and by way of mortgage, secure to the other any or all of the real estate of which he may be seized, and *such mortgage shall be held by each for*
44 *his more perfect indemnity* because of said guaranty and endorsement * * and other obligation * * * * * "

The language of the mortgages themselves concurs in terms with the above memorandum; thus, on folio 190 of the Transcript it reads * "And that I, the said James T. Welsman and the said George A. Trenholm, should *each save the other harmless*, on account of any claim, by reason of the said guaranties endorsements and obligations, *beyond the proportion so agreed to be assumed by each* * * *"

The conditions of the mortgage being to secure the mutual
45 covenants, and the covenants being, thus in express terms, that each was to pay a certain sum, and to save the other harmless against claim beyond the sum separately assumed by him, in case they were made liable; it was error to extend their force and effect so as to make their mutual covenants charges upon the lands of the respective mortgagors, for the absolute payment, in any event, of $400,000 by George A. Trenholm and $310,000 by James T. Welsman, so that if either was made to pay, or did pay, less than his said agreement, he could still hold his co-surety liable to him for falling short in
46 the payments by said co-surety of his full amount, that is to say, that, although Welsman might pay nothing of his agreed proportion, he could still hold Trenholm liable to him for paying less than $400,000, his agreed amount; and *vice versa*.

The contract between them was not that George A. Trenholm should pay forty seventy-one parts and James T. Welsman thirty-one seventy-one parts of *whatever sum* either might be called on to pay, as the special master has construed it, but it was, in terms, that the total liability of $710,000 on the B bonds was divided between them, each assumed his
47 definite part, George A. Trenholm assumed $400,000, James

T. Welsman assumed $310,000; neither could call on the other for contribution within those amounts, and neither would have the right to claim against the other under the mutual mortgages, unless he paid *more than his assumed amount*. The contract, as constructed by the special master, amounts to an agreement to contribute, in a certain *proportion, to whatever amount either might have to pay*, which was not what the parties declared to be their agreement in the mutual mortgages. 48

POINT SECOND.

It was error to admit in evidence the endorsement made by Welsman in January, 1873, upon the B bonds which had been paid by George A. Trenholm, and upon such evidence, hold, as did the special master, that such endorsement clearly recognizes the Welsman mortgage as a security in the hands of Trenholm and his assigns for Welsman's proportion of the money advanced by Trenholm to pay these bonds, though the amount fell short of $400,000, and it was error to hold that by such endorsement, made four years after the execution of the mortgages, "the parties to the mortgages have given a practical construction to the contract, which will be enforced." 49

The "inflexible rule of law," by which the Court is governed, is, as stated by Ch. Kent, "that parol evidence is not admissible to supply or contradict, enlarge or vary the words of a contract in writing. * * So, when a contract is reduced to writing all matters of negotiation and discussion on the subject antecedent to and *dehors* the writing are excluded as being merged in the instrument." 50

2 Kent, 719, *556.

A fortiori, would matter of parol *subsequent to and dehors* the writing be excluded; so it is held "that when parties after whatever conversation or preparation at last reduce their agreement to writing, this may be looked upon as *the final* consummation of their negotiation and *the exact expression* of their purpose.

2 Parsons on Con., (696) 548.

The endorsement of Welsman, placed January, 1873, on 51

the B bonds, which his co-guarantor, Trenholm, had paid, was as follows. (See transcript fol. 144.)

"The proportion of the within bond for which the within bound James T. Welsman is liable, that is to say, thirty-one of the seventy-one parts thereof, have been paid by George A. Trenholm For that sum, with the interest, James T. Welsman is indebted to George A. Trenholm, and the mort-
52 gage from James T. Welsman to George A. Trenholm, bearing date May 3, A. D. 1869, and recorded in the Mesne Conveyance Office, Charleston County, in Book H, No. 15, p. 571, is acknowledged by James T. Welsman to be security for the same to the said George A. Trenholm or his assigns.

(Signed) J. T. WELSMAN."

This acknowledgment of indebtedness in 1873 may constitute or be evidence of a new and independent parol contract, but it cannot alter the legal effect of the *mortgage deed* of June, 1869, nor vary *the sense of the words* then used
53 in their solemn deeds by both Welsman and George A. Trenholm.

It has not even the dignity of *cotemporaneous* parol testimony as explanatory of the meaning of doubtful words used in a deed or will, being four years after the deed, and in which deed the words are not doubtful.

It was said by Chief Bacon Eyre, in *Gibson* v. *Minet*, 1 H. Blk. 569, 614. "I venture to lay it down as a general rule respecting the interpretation of deeds, that all latitude of construction must submit to this restriction that the *words may*
54 *bear the sense*, which by construction, is put upon them. If we step beyond this rule, we no longer construe men's deeds, but make deeds for them. 2 Parsons on Con., (6 Ed., 641, 495, note.

The words of the mortgage deed, as plainly as words can speak, show that the indemnity was against either being made to suffer loss by being made to pay *over* a certain amount, and cannot bear the sense of indemnity, in case either shall pay *less* than the agreed amounts.

"In other words Courts cannot adopt *a construction* of any
55 legal instrument which shall do violence to the rules of lan-

guage and to the rules of law." In these mortgages there is no ambiguity whatever to give excuse to the court to resort to extrinsic evidence to discover intention of the parties. By the force given to the endorsements made by Welsman in 1873, upon the papers held by Trenholm, Welsman is then allowed to enlarge the previous claim of Trenholm under the mortgage deed of Welsman, and to give such claim precedence over the previous judgment, or other, lien creditors of Welsman. 56

Still less could such endorsements made by Welsman enlarge the previous claim of Welsman under the mortgage which he held upon George A. Trenholm's property, and yet this is the effect of the Decree.

Even if there were ambiguity on the face of these deeds of mortgage, the endorsement of Welsman could not be resorted to give a construction to them.

"*Ambiguitas patens*," said Lord Bacon, "is never holpen by averment, and the reason is because the law will not couple and mingle matter of specialty, which is of the higher account 57 with matter of averment which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed which the law appointed shall not pass but by deed."

Bacon's Max. Reg. 23.

POINT THIRD.

The fundamental error in the Master's report and in the decree is, that the Court below appropriates to the payment 58 of creditors of Theodore D. Wagner and of William L. Trenholm, not a security or fund furnished by the principal debtors and given to them by their sureties, George A. Trenholm and James T. Welsman, but a private security, given by one of the co-sureties to the other, under a separate and private covenant between themselves—to which neither the principal debtors nor their creditors were privy—by which mutual covenants the two sureties divided the joint liability between them, in certain agreed proportions, and mutually bound themselves to indemnify each other against any loss, 59

which might come to either by his being made to pay more than his agreed amount of the joint liability.

The report bases the assumed "equity of the Creditors" in this case, "to be subrogated to the rights of their debtors and to assert a *quasi* lien, by administering the equities between Welsman and Trenholm," on "the principle first announced in *Maure vs. Harrison, Eq., Cas. Abr. 93*, in which it was held, that a bond creditor shall have in a Court of Equity,
60 all counter bonds or collateral securities *given by the principal* to the surety," which was followed in the cases of *Wright vs. Morley, 11 Vesey 22*, and " Exparte Waring, 19 Vesey, 345.

The report admits, that "the form in which the question has usually come up is upon the claim for securities *given by the principal debtor to his surety, or to the creditor*," and that in the present case the security was not given by the principal debtor, but by the co-surety, * * but, the Special Master goes on to say (without naming an authority), "but this circumstance is not sufficient to take the case out of the rule."

61 We have not been able to find any case in which such an application of the principle of subrogation has been attempted. We believe none can be found in the books.

There is subrogation, where the principal debtor has placed securities in the hands of his surety for his protection or reimbursement in case he pays the debt, and where neither the principal nor the surety has satisfied the debt; there the Court of Equity transfers to the creditor the right to the securities, which the surety held. This was the case of *Maure vs. Harrison*, 1 Eq. Ca. Abr. 93. It is there stated thus: " A bond creditor
62 shall, in this Court, have the benefit of all counter-bonds or collateral security given by the principal to the surety; as if *A* owes *B* money, and he and *C* are bound for it, *A* gives *C* a mortgage or bond to indemnify him, *B* shall have the benefit of it to recover his debt."

In *Wright vs. Morley*, 11 Vesey, 12, (22) the Master of the Rolls said, "I conceive that as the creditor is entitled to the benefit of all the securities *the principal debtor has given to his surety*, the surety has full as good an equity to the benefit of all the securities *the principal gives to the creditor*." * * and
63 again: "The surety, therefore, *with regard to the payments he*

has actually made of this annuity, is entitled to stand in the place of the creditor, and to be reimbursed out of the dividends, and he has also an equity to have the funds applied to his exoneration, *that fund being provided by the principal debtor* and made subject to the payment of his annuity."

In *ex parte Waring*, 19 Vesey, 345, it was held that "securities held by a banker against his acceptances are available to the billholders, *not directly*, but *through the equity of the acceptor*, to have them applied in discharge of the acceptances." 64

In argument in that case it was said: "The case of *Maure vs. Harrison* has established, that the creditor shall have the benefit of securities *given by the principal debtor to the surety;* which case is fortified by the opinion of the Master of the Rolls, in *Wright vs. Morley*, that as the creditor is entitled to the benefit of all the securities *the principal debtor has given to the surety*, the surety has full as good an equity to the benefit of all the securities *the principal gives to the creditor.*"

The Lord Chancellor (Eldon) affirmed the principle, but, however, with great caution. After stating that "the prayer 65
has been supported upon this ground, that the securities *having been placed in the hands of the acceptor, as security* against their acceptances, the holders of those bills have an equity to have that security applied specifically to the discharge of those acceptances, upon the general ground that upon a transaction of this kind a person holding the bills, which was the subject of indemnity, has the right to the benefit of *the contract between the principal debtor and the party indemnified*, and though not himself a party to that contract, to say that he, who has *contracted for the payment of certain debts out of those pledges*, is liable in 66
equity to the demand upon the part of those whose demands are to be so paid, *for that application*, and a case is cited which goes that length. With regard to that case, or cases in general, I desire to be understood that I forbear to give any opinion on that point. * * If these billholders are to have payment in preference to the other creditors, it must be by the effect of an equity between those two houses, rather than by any demand directly in their own right upon any fund in the hands of B. & Co.," (the acceptors.)

The citations from these cases clearly show, that the essence of, 67

the principle of subrogation in favor of a creditor lies in the fact that the securities have been *furnished by the principal debtor*, and placed by him in the hands of his surety, under a contract *between such principal debtor and the surety*, for the indemnity of the surety, against loss, occasioned by his having to pay the debt of the principal. It is this contract, to the benefit of which equity subrogates the creditor, by putting him in the place of the surety, and by applying the securities given by the principal
68 to payment of the debt to the discharge of which they were specially given by the debtor. It is because the principal debtor has furnished to the surety the means of paying the debt that equity lays hold on the securities so furnished, and because it would be inequitable for this surety, failing to pay the debt, to hold on to the securities.

There is nothing in that principle, nor in those cases, or any other following them, applicable to a case where a security has *not* been given by the principal debtor to the surety, for his indemnity, but has been given by *one* of two co-sureties to the *other*,
69 under a private contract between them, dividing the joint liability, and mutually protecting each other against *over-payment*, beyond a sum which each, in their mutual covenant, had agreed should be the *limit* of the other's liability.

POINT FOURTH.

The contract, by which the co-guarantors upon the B bonds divided the amount of liability between them, and each assumed, as between themselves, a separate amount, as the limit of their respective liability, was a valid contract, limiting their right of
70 contribution against each other.

"Although the principle of contribution is not founded upon contract, still a person may, by contract, qualify or take himself out of the reach of the principle or the implied contract. Thus, where three persons became bound for the principal debtor in an obligation, and agreed among themselves, that, if the principal debtor failed to pay the debt, they would pay *their respective parts*; two became insolvent, and the third paid the money; and one of the insolvent sureties afterwards becoming solvent, he was held liable to contribute one-third only."

71 White & Tudor's Leading Cases in Equity, p 83. (Com-

menting on Dewing *vs.* Earl of Winchester,) citing Swain *vs.* Wall, 1 Ch. Rep. 149. See also, Craythorne *vs.* Swinburne, 14 Vesey, 165; Coope *vs.* Twynam, T. & R., 426. Collins *vs.* Prosser, 1 B. & C.

"Co-sureties, otherwise entitled to contribution, may ,by agreement among themselves, so far sever their unity of interest and obligation as to terminate the right of contribution." 72

White & Tudor, L. Ca. Eq., p 98, citing Devereux & Battle's Eqy. 372, 374.

1 Story's Eqy. Jurisprudence, § 498.

POINT FIFTH.

The equity of contribution between sureties arises only in favor of one, who has paid the debt, and to the extent of actual payment. 73

The statement of the doctrine in all the cases is to that effect. It is only to such payment, and after such payment, actually made, that one co-surety can call upon the other to *contribute*.

A surety, who has paid part of a debt may call upon the *principal debtor* for *indemnity* against the whole liability, but there is no legal claim for *indemnity* between sureties. Their's is only the claim for *contribution*, based upon proof of *actual payment*.

74

In this case, Welsman, as we have seen, paid nothing, and consequently, had no foundation for claim, or equity of *contribution*, against the co-surety, George A. Trenholm. There was, therefore, no equity of Welsman through which the creditor could reach George A. Trenholm's property.

So, if George A. Trenholm had not by his contract with Welsman arranged the liability between them, "terminating the right of contribution," as it would otherwise have existed, viz: for a moiety of amounts actually paid by him, and had not substituted the arrangement by which he could call on Welsman *only* for what he should pay *over* $400,000, the utmost he *could have* claimed against Welsman was a moiety of $108,454.45, the amount actually paid by him. 75

POINT SIXTH.

A claim for contribution, if it existed here, could not be enforced against the rights of creditors of either of the co-sureties.

It would scarcely be allowed that in a conflict, between the surety claiming contribution from his co-surety on the one hand, and the creditors of such co-surety on the other, the co-surety
72 claiming contribution would be entitled to more than a mere equity.

Such an equity it would seem, would yield to a legal right, or to a debt, even a simple contract debt, due to the separate creditor of the co-surety. Whatever question of rank, between such claimants, might arise in settlement of estates, certainly no such equity for contribution could rank *higher* than a simple contract debt.

So that, in this case, if George A. Trenholm had not terminated his right of contribution, by his agreement with Welsman,
73 and, if his executor could here claim in equity against Welsman's estate contribution for a moiety of the amount *actually paid by him* (within the $400,000 he had separately assumed) such equity of contribution could not prevail over the higher claim of the administrator of Hampton, which stands in judgment against Welsman.

Nor could it prevail in favor of George A. Trenholm against the higher equity, which the administrator of Hampton would have, as a judgment creditor of George A. Trenholm. In other words, before the Court of Equity would decree *contribution* by
74 Welsman to Trenholm, it would require Trenholm to pay his own debt to his judgment creditor, the administrator of Hampton.

Still more, would a Court of Equity, before allowing George A. Trenholm's executor to charge his claim of *contribution* against Welsman's real estate, require such executor to pay the judgment debt of his testator, before he could take the proceeds of Welsman's property away from the judgment creditor of George A. Trenholm, who happens, at the same time, to be the judgment creditor of Welsman.

75 It is admitted by the Special Master, that *only* through the

equities of the co-sureties against each other can the creditors enforce their claim to the securities here sought to be applied to their benefit, and by the principle of *subrogation* alone can they substitute themselves in the place of either surety as to his claim against his co-surety for contribution.

If, as we have shown, there would be no equity for contribution in this case, and certainly no equity, either of George A. Trenholm, as against Welsman, or of Welsman against Trenholm, equal or superior to the legal and equitable rights of the 76
judgment creditors, of both, then there can be no *subrogation* which can prevail as against the administrator of Hampton in this case.

"It should be observed that, as subrogation is the creature of equity, it will never be enforced against the superior equities of third persons."

White & Tudor, Leading Cases in Equity, p. 99, citing *Patterson vs. Pope*, 5 Dana, 241; Erb's Appeal, 2 Penrose & Watts, 296; Goswiler's Estate, 3 Id., 300; Hines *vs.* Keeler, 3 Watts 77
& Sergeant, 401, 404.

It is said, also, that it will not be enforced in the face of a legal right; and that if the law has decided against a surety's claim, equity will not give him that claim through the medium of subrogation. *Fink vs. Mahaffy, 8 Watts, 384.*" *Ib.*

In this case the judgment claim of the administrator of Hampton is a legal right, as well as a superior equity; it is so by the force of Statute, which, (in 1869, when the judgment was recovered,) imperatively required that in the settlement of their estates the order of payment of their individual debts should be: 78

1st. Funeral expenses, &c.
2d. Debts due to the public.
3d. Judgments, mortgages, and executions; the oldest first.
4th. Rent.
5th. Bonds and other obligations.
6th. And last, debts due by open account.

A. A., 1789. *Vide*, Stat. at Large So. Ca., Vol. V., p. 111; G. S., p. 457, 1872. 79

The judgment of Hampton, administrator, was also a *lien*, from 19th June, 1869, the date of its entry, upon all the property of George A. Trenholm and of James T. Welsman, in South Carolina. It is so admitted to be, in the report of the Special Master. (Transcript, fol. 147.)

THEODORE G. BARKER,

80 *For Appellant, C. F. Hampton, Administrator.*

108-260

OFFICE SUPREME COURT U. S.
FILED
MAR 23 1883
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

CHRISTOPHER F. HAMPTON, *Administrator*, ET. AL.,
vs.
J. L. PHIPPS.

APPEAL FROM THE CIRCUIT COURT OF SOUTH CAROLINA.

STATEMENT OF FACTS.

Some time in the year 1867 the firm of John Fraser & Co. No. 2, in Charleston, and Fraser, Trenholm & Co., in Liverpool, failed. In settlement and compromise of their liabilities Theodore D. Wagner and William L. Trenholm, two of the co-partners, executed and delivered their joint and several bonds under seal in two classes or series, known as "A" bonds and "B" bonds.

With the "A" bonds we have nothing to do.

The "B" bonds were dated 1st January, 1868, and aggregated $710,000. Upon all the "B" bonds was endorsed the joint and several guaranty under seal of George A. Trenholm and James T. Welsman (who were not co-partners in the firm). In further and final settlement of the liabilities of the firm, George A. Trenholm and James T. Welsman executed and delivered their joint and several obligation, forming a third class or series, known as "C" bonds, to the amount of $101,448. These bonds were all delivered and

distributed among the creditors. Thereafter, on 3d May, 1869, an agreement in writing was executed between George A. Trenholm and James T. Welsman. (*Brief, ff. 179–187.*)

This agreement recites the issuing and guaranty of the "B" bonds and the further issuing of the "C" bonds, and that at the time of the issuing and guaranty of the said bonds, George A. Trenholm and James T. Welsman had agreed between themselves as follows:

1. That of the "B" bonds George A. Trenholm should be liable for $400,000 and James T. Welsman for $310,000.
2. That of the "C" bonds George A. Trenholm should be liable for $\frac{4}{7}$ and James T. Welsman for $\frac{3}{7}$ parts thereof.
3. That they had guaranteed and issued the bonds with the clear understanding that each would be liable to the other for the discharge of the sum and proportion by each respectively undertaken, and that each would indemnify the other from all loss by reason of such guaranty and obligation beyond the amount by each assumed.
4. To make such mortgage each to the other of such property as would secure each other from all loss, as therein stated.

The agreement then proceeds in its operative part to declare that the agreement had properly recited the understanding between them, and to agree and covenant:

"That each is as to the other bound fully to discharge "and satisfy such amount and such proportion as is herein- "before recited and set forth, as so undertaken by each as "the amount and proportion for which he is liable, and that "each will save and keep harmless and indemnified the "other from all claim, demand and damage for or by reason "of the amount or proportion so undertaken by him" *Brief, folio 186.*

On the same day, viz: 3d May, 1869, George A. Trenholm and James T. Welsman executed and delivered each to the

other respectively mortgages of their respective real property. *Brief, folios 188–216.* The mortgages are the same in form. They recite first the memorandum of agreement and its contents, and proceed:

"That in order to secure the due performance of the "same, and of the covenants therein contained," they each mortgage to the other the real estate therein mentioned, and the proviso is:

"That if each shall well and truly perform the said cove- "nants, agreement and understanding contained in said "memorandum bearing even date herewith in manner and "form as in the said memorandum set forth," then to be null and void, &c., &c. *Brief, folio 198.*

These mortgages were duly recorded in proper time.

On 19th June, 1869, subsequent to the execution and record of the mortgages, Christopher F. Hampton, as administrator of Frank Hampton, deceased, recovered a judgment against George A. Trenholm, James T. Welsman, Theodore D. Wagner and Charles K. Prioleau, as members of a former firm of John Fraser & Co., for the sum of $109,043.25. *Brief, folio 144.*

On the 13th June, 1871, George A. Trenholm executed to James T. Welsman, as executor of James Welsman, a mortgage of $\frac{3}{5}$ of the Pavilion Hotel, one of the pieces of property already included in the mortgage of 3d May, 1869. *Brief, folio 144.*

Thereafter William L. Trenholm and Theodore D. Wagner, the obligors on the "B" bonds, became hopelessly insolvent.

Thereafter George A. Trenholm and James T. Welsman died, each leaving a last will, upon which the executors in each case qualified.

Thereafter J. L. Phipps, a holder of "B" bonds, brought this bill on behalf of himself and other creditors, holders of "B" and "C" bonds. The bill alleges all the above facts,

and that George A. Trenholm and James T. Welsman had left no property, except that contained in the mortgages, out of which the outstanding "B" and "C" bonds could be paid, and claimed that the holders of the "B" and "C" bonds were entitled in equity to the benefit of the lien of the mortgages of 3d May, 1869, and prayed that the same be sold and the proceeds be applied to the payment of the bonds, &c. To the bill the following parties defendant were made:

Theodore D. Wagner and William L. Trenholm, the obligors on the "B" bonds.

The executor of George A. Trenholm.

The widow of George A. Trenholm, his sole legatee and devisee.

The heirs at law of George A. Trenholm.

The executors of James T. Welsman.

The sole legatee and devisee under the will of James T. Welsman, who was also his sole heir at law.

Christopher F. Hampton, administrator, holder of a judgment; and the executrixes of James Welsman, holders of a mortgage; as junior encumbrancers.

All the parties answered, except certain of the heirs at law of George A. Trenholm, against whom judgment *pro confesso* was entered.

The answers of Christopher F. Hampton, administrator, and the executrixes of James T. Welsman, Appellants in this Court, are the only ones which need be noticed, as they raise all the questions.

The answer of Christopher F. Hampton, administrator,

1. Denies that the holders of the "B" and "C" bonds have any right to the lien of the mortgages of 3d May, 1869, and denies that the Court has any jurisdiction over the bill.

2. Alleges that the lien of the judgment of 19th June, 1869, is a lien on the property described in the mortgages of 3d May, prior to the lien of the "B" and "C" bonds. *Brief, folios 25–31.*

The answer of the executrixes of James Welsman—

1. Denies that the holders of the "B" and "C" bonds are entitled to the benefit of the lien of the mortgages of 3d May, 1869.

2. Alleges that at the time of the guaranty and issuing of the "B" and "C" bonds, a large amount of personal securities had been delivered to George A. Trenholm by John Fraser & Co. No. 2, to be sold and applied to the extinguishment of the said bonds, and had so been; and that the outstanding "B" and "C" bonds were in large part bonds paid out of such securities and reissued by George A. Trenholm; and that neither George A. Trenholm or James T. Welsman had ever paid the proportion of such bonds assumed by them, and the mortgages had never become operative and were no liens on the property.

3. Alleges that the mortgage of three-fifths of the Pavilion Hotel of 13th June, 1871, was in consequence a lien thereon, prior to the lien of the mortgage of 3d May, 1869. *Brief, folios 32–56.*

The case was referred to Samuel Lord, Jr., as Special Master, to take testimony and report his conclusions of law and fact. The Master reported—

1. That Theodore D. Wagner and William L. Trenholm were both insolvent and bankrupt. *Brief, folios 142 and 144.*

2. That the property of George A. Trenholm and James T. Welsman not embraced in the mortgages was of very little value in comparison with their liabilities on the outstanding "B" bonds. *Brief, folio 143.*

3. That the entire issue of "C" bonds had been retired.

4. That there were outstanding of "B" bonds $680,145, of which a part were held as collateral security to notes given to take up the same at maturity, on which notes payments had been made. *Brief, folio 143.*

5. That a large amount of personal securites had been transferred to George A. Trenholm by John Fraser & Co.

for the payment of the "B" and "C" bonds, but that the same had been faithfully accounted for by him, and the proceeds applied, so far as they would go, to the extinguishment of the "B" and "C" bonds, and that after such application there still remained to be contributed by the estates of George A. Trenholm and James T. Welsman the sum of $573,300, on outstanding "B" bonds and notes secured by "B" bonds. *Brief, folio 141.*

6. That of this $573,300, the estate of George A. Trenholm was liable for $\frac{4}{7}$ or $322,986, on which he had paid $108,454, leaving his estate still liable for $214,532; and that the estate of James T. Welsman was liable for $\frac{3}{7}$, or $250,314, of which nothing had been paid. *Brief, folio 143.*

7. As matter of law the Master reported that the effect of the agreement and mortgage was to give a lien, not for the payment of the whole issue of bonds, but for the portion thereof assumed by each mortgagee, viz: Welsman had a lien on Trenholm's property under his mortgage for the $214,532 still due by Trenholm on his $\frac{4}{7}$, and Trenholm had a lien under Welsman's mortgage for the $250,314 still due by Welsman on his $\frac{3}{7}$; and that the holders of the "B" bonds were under the rule of *Maure vs. Harrison* subrogated to the lien of the mortgagees, Trenholm and Welsman, to that extent, but no more, and that if the mortgaged property of either was more than sufficient to pay out the proportion of the bonds still due by his estate, the overplus would be subject to the liens of the junior encumbrances. *Brief, folio 148.*

To this report Christopher F. Hampton, administrator, and the executrixes of James Welsman, excepted.

Their exceptions in brief cover the same grounds as raised in the answers, with the addition in the case of Hampton, administrator, of a claim that the equity or interest given to either George A. Trenholm or James T. Welsman by the mortgages of 3d May, 1869, was an estate in both bound by the lien of the Hampton judgment, and that any equity or claim for contribution thereunder is by the law

of South Carolina postponed in the order of payment of debts to the claim of a judgment creditor. *Brief, folios 167–178.*

The report was confirmed by the Court, and a decree entered in accordance therewith 29th May, 1879. *Brief, folio 225.*

From this decree Hampton, administrator, and the executrixes of James Welsman have appealed.

ARGUMENT.

The exceptions on points of fact made by the executors of James Welsman are so fully disposed of in the report of the Special Master that they need not be considered. No testimony whatever was introduced to show that any bonds had been paid and reissued, and the only testimony upon that point shows just the contrary. *Brief, folios 133–134.*

The Master's conclusions of fact concurred in by the Court below in a Chancery case, will not be disturbed by this Court unless the clear preponderating weight of the testimony is against them.

The position is this:

Theodore D. Wagner and William L. Trenholm are the obligors of the bonds. G. A. Trenholm and James T. Welsman are co-guarantors of the same. As towards their creditors, the holders of the bonds, they all stand liable *in solido* for the payment of the same. As towards each other, the co-guarantors under their agreement stand—James T. Welsman liable for $\frac{3}{11}$, and George A. Trenholm for $\frac{8}{11}$, of the amount of the bonds. This being the case, the co-guarantors have interchangeably executed and delivered to each other mortgages of the real estate set forth in the bill to secure the discharge and payment by each of the proportion by him assumed, and to secure, indemnify and save harmless either from paying more than the portion for which, as stipulated between themselves, each should be liable.

These mortgages thus, at the instant of execution, invest-

ed each of the co-guarantors with the power, if he should ever pay his stipulated proportion of the bonds, or if he should pay more than the same to foreclose and sell the real property so mortgaged and have the proceeds applied to the payment of the unpaid bonds, or reimburse himself for such overpayment.

Further, these mortgages became, from the instant of execution, a valid and subsisting lien on the real estate until all of the bonds should have been paid; and from and after the payment of the last bond, that mortgage continues as a lien which was held by the guarantor who had paid more than his proportion; and so continues until discharged by reimbursement of the amount so overpaid by himself.

This lien so continues until the last bond is paid, for not until the last bond is paid will the purposes for which the mortgages were originally given be accomplished, and the rates of payment adjusted.

The claim of the holders of the guaranteed bonds is that they are entitled to the benefit of these mortgages, and have the right to proceed against the real estate in foreclosure, and sell the same, and apply the proceeds in satisfaction of the guaranteed bonds; and they claim this because the bonds, by virtue of these mortgages, given for payment and indemnity, have become a lien on the real estate mortgaged.

The rule of equity is that the creditor is entitled to the benefit of all securities given to the surety to indemnify him, or for the payment of the debt for which he stands surety. The form in which the question has usually come up is upon the claim for the counter securities given by a principal debtor to his surety. But the rule is not limited by this application of it. It is that the creditor of any particular indebtedness is entitled to the benefit of all securities whatsoever by whomsoever given to the surety for his indemnity on that indebtedness, or for the payment thereof.

The logical necessity and the equity of this rule we purpose to show; and we submit, as a corollary from it, that the creditors as bondholders in this case, are entitled to the securities given by one co-surety to another to indemnify him on those bonds.

The obligors of the bonds, the principal creditors, are bankrupt and hopelessly insolvent. They may, therefore, be shut out of sight in the consideration of this case. The bondholders have only the guarantors to look to for payment; and against them they can proceed at once without taking any steps against the insolvent obligees. The attitude, therefore, of the co-guarantors, George A. Trenholm and James T. Welsman, to the bondholders, is that of persons who are both liable *in solido* individually, and to the whole extent of their individual estates, for the payment of the bonds, as much so as if they were originally the principal creditors.

Their position is exactly analogous to that of obligee and surety on a bond. G. A. Trenholm is liable *in solido* on the bonds, and Welsman is liable as his surety; and Welsman is liable *in solido* on them and G. A. Trenholm is liable as his surety.

Any bondholder could, at law, obtain judgment jointly and severally against both, and could then elect to sell under execution the estate of G. A. Trenholm, and leave that of Welsman, or *vice versa;* or could levy on the estate of both at the same time for sufficient to pay his judgment.

As towards the creditors who hold the guaranteed bonds, therefore (and without reference to any relations they may hold towards each other), as towards the creditors, the co-guarantors now stand precisely as if they were both principal debtors, and sureties each for the other. The rule then that gives to a creditor the advantage of any securities given to a surety by a principal debtor for that surety's indemnity, would in like manner give to the creditor the advantage of all securities given by a co-surety to his co-surety for the latters indemnity on the same indebtedness.

The answer to this, advanced by Appellants, is that neither Trenholm nor Welsman can proceed on the mortgage to either of them until that one has paid his stipulated proportion of the bonds, that is, that Trenholm cannot proceed on the mortgage given by Welsman until he has paid more than $\frac{4}{7}$ of the whole amount of the bonds; and in

like manner Welsman could not proceed until he had paid more than $\frac{4}{5}$, that being his proportion under the agreement. The object of the mortgages being to save them harmless from overpayment.

But this is just the position of principal debtor and surety on any obligation. The surety can take no steps to enforce the counter security until he has paid the indebtedness for which he stood as surety. But the creditor can proceed against this counter security although the surety cannot. That is, if A and B give a bond to C, A being principal debtor and B his surety, and A gives to B a mortgage to indemnify and save B harmless by reason of his suretyship; now, if the bond to C be unpaid when it becomes due, C, the creditor, can proceed directly to enforce the mortgage given by A to B, although B himself cannot enforce it until he has paid the bond, or a portion of it.

And the reason as well as the justice of the rule is manifest. If the principal debtor give a mortgage of his property to his surety to indemnify him, the mortgage stands as a subsisting lien until the bond is paid, so as to make it impossible that the surety be damnified by having to pay the same. Therefore, if the creditor get judgment, he cannot levy on the property of his debtor so mortgaged, because, if he did, it would be sold subject to the lien of the mortgage to the surety, and no one would purchase. In like manner, if he went on and obtained judgment against the surety he could do nothing if the surety had no property on which he could levy. It is here that equity steps in, and by giving to the creditor the advantage of the lien given to the surety, allows him, by enforcing the mortgage, to sell the land of his debtor, and apply the same to his indebtedness. And, according to the true principles of equity, the creditor can proceed directly on the security as if it had been originally given in terms to secure his indebtedness, and not be put to the circumlocution first of action at law, and then to proceed in equity.

To put the case as before. If the bond given by A to C

be not paid by A when due, and the surety, B, also fails to pay when called on so to do, then C can assert his claim to the security and mortgage given to B, directly in equity, without first proceeding at law against A and B, because his judgment at law could not be enforced as long as the lien of the mortgage from A to B continued.

Now, applying this reasoning to the present case, if a creditor, a bondholder, bring his action against Trenholm and Welsman at law, and get his judgment, his judgment would be fruitless. He could not levy on and sell the property of Trenholm, because it being mortgaged to Welsman no one would purchase; and for the same reason he could not levy on and sell the property of Welsman, since no one would purchase with the mortgage to Trenholm outstanding.

It is here that the rule of equity steps in, and allows him to proceed, by giving him the benefit of the mortgage, and allowing him to foreclose and sell the property free from encumbrances, and apply the proceeds to the payment of his debt. No harm is worked, because Welsman is liable for the whole indebtedness, and cannot complain if his property is sold to pay the same; and Trenholm stands in the same predicament. Otherwise, the creditor who holds the guaranty of both is postponed to a long accounting between the estates of the two guarantors, to ascertain which has overpaid, and which mortgage is still subsisting.

It will be observed that the agreement between Trenholm and Welsman, to secure the performance of which the mortgages were given, was not only that each should pay a certain proportion of the whole amount of the bonds, but also that proportion of each particular bond; that is, Trenholm did not have to wait until he had paid more than $400,000 of the aggregate bonds before he could proceed on his mortgages; but, upon paying any particular bond, or his portion thereof, he had a right to compel Welsman to pay $\frac{3}{4}$ parts of it, and to compel such payment by proceedings on the mortgage; and Welsman possessed the same rights and powers with regard to the mortgage to him.

If any individual creditor of Mr. Welsman, during his life-

time, had obtained judgment against him, and proceeded to levy upon and sell his mortgaged property, it would have been sold subject to the incumbrance of the mortgage to Mr. Trenholm, although Mr. Trenholm had not yet paid a dollar of the bonds. On the contrary, if any execution creditor had so levied on and sold Mr. Welsman's real estate, and Mr. Trenholm had afterwards paid the whole amount, he would have been entitled to a prior lien on the property so sold for the full amount overpaid by him.

It is manifest then that the sole method by which the holders of these bonds can have the same paid, is by proceeding on the security that has enured to them, selling the property free from encumbrances, and applying the proceeds to the payment of the bonds; there being no property sufficient to pay the bonds outside of the real property mortgaged.

All of Mr. Trenholm's property is liable for these bonds, and so is all of the property of Mr. Welsman. The bondholders reach the property of Mr. Trenholm by their equity through Mr. Welsman; and they reach the property of Mr. Welsman by their equity through Mr. Trenholm. And this is the only way in which this property can be reached and applied to the payment of these bonds.

The propositions which the bondholders advance as the rules under which are deduced the conclusions we have stated, are—

I. That all securities given to a surety, whether in terms to pay the debt for which he is surety, or to indemnify and save him harmless from any harm or loss by reason of his suretyship, enure to the benefit of the creditor, who is entitled to apply the same in satisfaction of the debt.

II. That the above rule applies to all securities by whomsoever given to the surety to indemnify him; and that the security given by one co-surety to secure and save harmless his co-surety, comes within the rule, and the creditor is entitled to the benefit of the same.

III. Upon the failure of the principal debtor and surety to pay the debt when due, whether by reason of insolvency or otherwise, the creditor can proceed directly on the security, in the ordinary and customary method of enforcing the same; that is, in the method in which the surety himself might have enforced it.

I.

The covenants of the agreement are twofold:

1. That each party to the agreement would pay and discharge the proportion of the "B" and "C" bonds assumed by him.
2. That each would indemnify and save harmless the other from any loss or damage by reason of any overpayment of this proportion.

The mortgages of 3d May, 1869, were given expressly to secure the due performance of the covenants of the agreement, and their effect was:

1. To secure the payment by each mortgagor of this proportion of bonds assumed by him.
2. To secure and save harmless each mortgagor from any loss by reason of the overpayment of this proportion.

The leading case on the first proposition is the now familiar one of *Maure vs. Harrison*, 1 Eq. Cas. Ab. 93, in which it was decided that

"A bond creditor shall, in this Court, have the benefit of all counter bonds "or collateral security given by the principal to the surety.

This was followed in *Wright vs. Morley*, 11 Vesey, 22, and *Ex-parte Waring*, 10 Vesey, 345, where it was laid down by Lord Eldon, that

Securities given to a banker to indemnify him against certain acceptances,

enure to the benefit of the holders of the acceptances; not directly, but through the equity of the acceptor or those claiming through him to have these securities applied in discharge of the acceptance.

As is well observed by the Special Master in his report (*Brief, f. 149*): We have in the present case the precise condition of things which was held by Lord Eldon in *ex parte Waring*, to entitle the condition to enforce the security—held by their debtor—viz: "Both of the principal debtors are in bankruptcy. The liability of the guarantor has become absolute, and their estates are not in a condition to make payment of the bonds."

In *Moses vs. Murgatroyd*, 1 Johnson's Ch., 119, where an assignment had been made as a collateral security, by the maker of notes to secure his endorser, Chancellor Kent held that the holders of the notes were entitled to the benefit of this collateral security given by this principal debtor to his surety. So in *Phillips vs. Thompson*, 2 Johnson's Ch., 418, it was held that a holder of a note is entitled to the benefit of any collateral security given by the maker to the endorser for his indemnity.

Hayes vs. Ward, 4 Johnson Ch., 123.

In *Haggerty vs. Pitman*, 1 Paige, 299, the Chancellor held that where a debtor makes an assignment to his surety for his indemnity, the creditor has an equitable claim upon the fund for the payment of his debt; and the surety has no right to divert it to any other object.

Heath vs. Hand, 1 Paige, 329.

Hopewell vs. Bank of Cumberland, 10 Leigh, 206.

The case of *Curtis vs. Tyler*, 9 Paige, 432, is very strong. In this case Tyler made his bond and mortgage to M, the payment of the bond being guaranteed by A. The bond was afterwards assigned by M to B—A having first executed a bond to M, to secure the payment of the bond guaranteed by him. B assigns the bond to C, who brought his bill to foreclose, and made A a party to get judgment

against him for the deficiency, on the ground that he was liable on his bond to M, and that the assignees of the original bond were entitled to the benefit of the collateral bond given by the guarantor. And the Chancellor held that the suit was well brought, because

"Where a surety, or a person standing in the situation of a surety, for the "payment of a debt, receives a security for his indemnity, and to discharge "such indebtedness the principal creditor is in equity entitled to the full benefit "of that security."

In this case the proceeding was brought directly on the security in equity, to subject it to the payment of the debt.

And in the later case of *Halsey vs Reid*, 4 Paige, 446, the Chancellor said, that

"It is a well settled principle of this Court that the creditor is entitled to "the benefit of the collateral obligations for the payment of the debt, which "any person standing in the situation of surety for others has received for his "indemnity and to discharge him from such payment."

In *Vail vs. Foster*, 4 Coms. (N. Y.) 312, Ch. J. Bronson said:

"It is a settled rule in equity, that the creditor shall have the benefit of "any counter bonds or collateral securities which the principal debtor has given "to the surety or person standing in the situation of a surety for his indem-"nity, such securities are regarded as trusts for the better security of the debt; "and Chancery will compel the execution of the trusts for the benefit of the "creditor."

So in the Supreme Court of South Carolina. The Court, in *Webster vs. Brown*, 2 Rich. (N. S.) 431, says:

"There is no doubt, as contended by the Appellant, that the creditor is en-"titled to the benefit of all securities or pledges in the hands of the surety, "which were designed to indemnify him, and has the right to be subrogated to "such interests."

So also in 1st Jones on Mortgages, the rule is stated, §387.

"When a mortgage is given to indemnify an endorser, the creditor has an "equitable claim to the security; and after the liability is fixed, is entitled to

"have the mortgage assigned to him. This is the rule, not only where the "condition is that the mortgagor shall pay the debt, but also where it merely "stipulates that he shall indemnify the surety."

Citing 9 Allen, 175; 4 R. I., 520; 3 Heisk, 525; 27 N. H., 236; 2 Johnson's Ch., 418.

The same rule has been lately followed with approval by the Supreme Court of South Carolina in two important cases:

Hand vs. S. and C. R. R. Co., 12 So. Ca. (Shand), 314—In this case, the State of South Carolina passed in 1856 an Act to aid in the construction of a railroad company, by endorsing the guaranty of the State upon bonds to be issued by the company. The Act provided that upon the endorsement of the guaranty of the bonds the State should be invested without further deed with a lien or mortgage upon the property of the railroad company, for the payment of the bonds so endorsed. In 1869 another Act was passed by the State authorizing the issue of bonds to be secured by a mortgage of the property of the railroad company, and postponing the lien of the Act of 1856 to the lien of the mortgage authorized by the Act of 1869—

Held: That the liens given by the Act of 1856 enured to the benefit as well of the holders of the guaranteed bonds as of the State, and that the holders of the bonds being entitled to the benefit of the security, the State could not postpone the lien to the prejudice of their priority.

Gibbes vs. G. and C. R. R. Co., 13 So. Ca. (Shand), 228—Under similar conditions the rule in *Hand vs. S. and C. R. R.* approved and followed, and the proposed postponement by the State held unlawful, as the holders of the guatanteed bonds were entitled *ab initio* to the benefit of the Statutory mortgage taken by the State for its indemnity.

And such is the firmly established rule in all the States.
29 Md., 144; 3 Gratt., 358; 51 Ala., 214;
79 Penn., A. 168; 5 Coldw., (Tenn.) 392; 42 Miss., 28.

So also in the United States Circuit Courts.

Young vs. M. and E. R. R. Co., 2 Woods, 609.
North Carolina R. R. vs. Drew, 3 Woods, 692.

II.

As to the second proposition, we have shown that once the liability is fixed, there is no difference as towards creditors between co-guarantor and principal debtor. That the reason and necessity of the rule is the same in both cases. In *Curtis vs. Tyler*, 1st Paige, 432, before cited, the Chancellor held that the creditor was entitled to *all* securities given to a surety to indemnify him; and in that very case a security given by one co-security to another, i. e. that given by A to M, was applied to the debt.

In the case of *Webster vs. Brown*, 2 Rich. (N. S.) 431, the Court said "that the creditor is entitled to the benefit of all securities or pledges in the hands of the surety, which were designed to indemnify him." And such is unquestionably the rule.

III.

As to the right of the creditor to proceed directly on the security, says Chief Justice Parker, in *Hopewell vs. Bank of Cumberland*, 10 Leigh, 206,

"If, property is pledged to either the creditor or a surety, though not to the "person seeking to charge it, it may be reached by substitution in a Court of "Equity without regard to the intention of the contractin parties. This arises "not from any notion of mutual contract between the parties, that in providing "for the surety the creditor shall be equally provided for, but from a principle "of natural equity independent of contract, namely: That to prevent the sure-"ty from being first harassed for the debt or liability, and then turning him "round to seek redress from a collateral security given by the principal, a Court "of Equity will authorize and encourage the creditor to claim through the *me-"dium* of the surety all the rights he has thus acquired, to be exercised for his "benefit and in discharge of his obligations."

So in the case of *Curtis vs. Tyler*, the Court enforced the

security by direct process in equity by the creditor against the same.

And in the cases previously cited the creditors proceeded directly without question.

And the point was decided in *Young vs. M. and E. R. R. Co.*, 2 Woods, 609.

In the case of *Re Jaycox and Green*, 8 Bank. Reg., 241, the question was most elaborately argued.

The point came upon the question of the right of the holders of certain claims to prove for the full amount of their claims against the bankrupt estate of the principal debtor, such claims being secured by a third party who held a mortgage on the bankrupt property to secure him against any loss by reason of such endorsement.

The Court held that the holders of the claims had an equitable lien on the securities given to the surety, against which they were bound to proceed, and, therefore, could not prove for the whole amount, but only for the unsecured remainder after deducting the value of such securities.

The reasoning in the case of *Jaycox and Green* seems decisive. It imposes on the principal creditor the *duty* as well as the *right* to resort to the indemnity securities, and declares most explicitly that their lien exists. How, otherwise, can they enforce it but through a Court of Equity; and how, otherwise, can the Complainants enforce their lien than by the present proceeding to sell the property mortgaged.

Lastly. The Appellant, Hampton, administrator, claims:

1. That the interest given to the mortgagors, George A. Trenholm and James T. Welsman, by the respective mortgages, was an *interest* or *estate* in each, bound by the Hampton judgment.

In South Carolina a final judgment is a lien on the real estate of the judgment debtor. It is a lien only on such real estate as he has the legal title to.

A mortgage by Statute is simply a *lien*, (*Revised Stat-*

utes So. Ca., Ed. 1873, p. 536, Ch. 116, § 1,) and the mortgagee has no title or estate in the property mortgaged. It is not denied that the judgment is a lien on the real estate of Welsman and Trenholm subsequent to the lien of the mortgages. To assert that the judgment is both a lien on Welsman's real estate and then assert that it is also a lien on the mortgage of the same real estate to Trenholm, is to say that if a party entirely a stranger to Welsman had recovered a judgment against Trenholm, he would thereupon have a mortgage not only on Trenholm's real estate, but also on the real estate of Welsman, and any other mortgage debtor of Trenholm, viz: a lien upon a lien, which is absurd.

2. That by the Statute law of South Carolina a judgment would have priority of payment over the equity of a surety for contribution; and therefore the Hampton judgment has priority of payment from the estates of Trenholm and Welsman over the equity of each, to contribution from the other.

By the Statute of South Carolina a judgment creditor, as also a creditor by specialty, had priority of payment out of the estate of a deceased person over all *general* creditors. *Revised Statutes So. Ca., Ed. 1873, p. 457, Ch. 90, § 3.*

But that is not the case here. A judgment has no priority for payment out of the proceeds of specific property pledged or mortgaged for a specific debt, but simply out of the general assets.

Here the bondholders are all specialty creditors of Trenholm and Welsman. The claim for contribution between Trenholm and Welsman is no mere equity, but by the agreement under seal is made a specialty debt; and to secure this specialty the mortgages were made, and the property embraced therein specifically pledged. A mortgage to have any effect must, when properly recorded, take effect from its date. When Trenholm and Welsman made the mortgages they intended to secure priority. To postpone the taking effect of the mortgages till the death of either mortgage is to render the whole effect of a mortgage for indem-

nity nugatory. The mortgages in the hands of either of the mortgagees took effect as of their date. Equity giving the benefit of the mortgages to the bondholders their lien must also relate to the date of the mortgages, and thus have precedence over the lien of a subsequent judgment.

JAMES LOWNDES,
Attorney for Respondents.

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198-260

UNITED STATES OF AMERICA.

IN THE SUPREME COURT.

FOURTH CIRCUIT.

SOUTH CAROLINA DISTRICT—IN EQUITY.

J. L. PHIPPS, ON BEHALF OF HIMSELF AND OTHERS, THE CREDITORS OF GEORGE A. TRENHOLM, AND JAMES T. WELSMAN, DECEASED, APPELLEES,

vs.

THEODORE D. WAGNER, WILLIAM L. TRENHOLM, IN HIS OWN RIGHT, AND AS SURVIVING COPARTNER OF THE FIRM OF GEORGE A. TRENHOLM & SON, AND AS EXECUTOR, OF GEORGE A. TRENHOLM, DECEASED; WILMOT G. DESAUSSURE AND ROBERT N. GOURDIN, EXECUTORS, AND EMMA S. WELSMAN, EXECUTRIX OF JAMES T. WELSMAN, DECEASED: ANNA HELEN TRENHOLM, WIDOW OF GEORGE A. TRENHOLM, EMILY ST. PIERRE HAZZARD, AND WILLIAM MILES HAZZARD, HER HUSBAND; ALFRED GLOVER TRENHOLM, ELIZA MACBETH AND ALEXANDER MACBETH, HER HUSBAND; FRANCIS H. TRENHOLM, EMMA JOSEPHINE WALKER, AND LEGARE J. WALKER, HER HUSBAND; CELESTINE ROBERTSON McCULLOUGH, AND DERRILL H. McCULLOUGH, HER HUSBAND; EMILY ST. PIERRE MORGAN, AN INFANT OF TENDER YEARS; CAROLINE NAPIER WELSMAN, CHRISTOPHER F. HAMPTON, ADMINISTRATOR OF THE ESTATE OF FRANK HAMPTON, DECEASED; AND MARIA C. OTIS, AND EMMA S. WELSMAN, EXECUTRIXES OF JAMES WELSMAN, DECEASED; CHRISTOPHER F. HAMPTON, ADMINISTRATOR, AND MARIA C. OTIS, AND EMMA S. WELSMAN, EXECUTRIXES, BEING THE APPELLANTS. 1 2

Brief of Argument of DeSaussure & Son, Attorneys of Maria C. Otis, and Emma S. Welsman, Executrixes of James Welsman, deceased, Appellants. 3

STATEMENT.

This is a Bill in Equity, filed 10th October, 1877. Transcript, fol. 2, by J. L. Phipps, a citizen of New York, on behalf of himself and all the other creditors and holders of certain obligations of George A. Trenholm, and James T. Welsman, of South Carolina, both deceased, against Theodore D. Wagner; William L. Trenholm, in his own right and as surviving co-
4 partner of the firm of George A. Trenholm & Son, and as Executor of George A. Trenholm; the Executor of James T. Welsman, the widow, children, and one grand child of George A. Trenholm; the child of James T. Welsman: the Executrixes of James Welsman, and the Administrator of Frank Hampton.

The Bill states that Theodore D. Wagner and William L. Trenholm, jointly and severally, made and executed, certain bonds under seal, dated 1st January, 1868, to James Robb, and Charles T. Lowndes, Trustees, in various penal sums, the
5 aggregate condition of the bonds being $710,000. Such bonds being divided into four series, numbered respectively, 1, 2, 3, 4; each series being for the payment of $177,500, and payable in four equal successive annual payments, the first payment to be made on 1st January, 1870, with interest at 6 per cent. per annum, on all of said bonds from 1st January, 1868, and payable annually on 1st January in each year.

That George A. Trenholm and James T. Welsman did, by their obligations in writing, duly endorsed under their hands and seals, upon all and each of said bonds, jointly and severally
6 guarantee, and become bound for the payment of the same, when they became due, with the accrued interest thereon:

That by endorsement on certain of such guaranteed bonds, the Trustees, Robb and Lowndes, assigned, set over and transferred the same, and directed payment thereof made to the holders thereof: that J. L. Phipps became and is lawful owner and holder of Bonds B., series No. 2, Nos. 549, 550, 553, 554, each conditioned for $200, with interest from 1st January, 1868, payable in January, 1871: of Bonds B., series No. 3, Nos. 1010, 1027, each conditioned for $500, with interest from 1st Jan-
7 uary, 1868, payable 1st January, 1872; and of Bonds B., series

No. 4, Nos. 695, 703, each conditioned for $500, with interest from 1st January, 1868, payable 1st January, 1873; that no interest on these bonds has been paid since 1st January, 1876, and the bonds are due and owing to the Plaintiff: That Plaintiff is ignorant how many of the bonds so guaranteed are still outstanding and unpaid; but that the conditions of all that are outstanding are broken, and that the whole of the same, with the accrued interest, is now due and unpaid.

That, by an agreement between George A. Trenholm and James T. Welsman, had at the time of the execution of said guarantees and endorsements, it was agreed and understood between them that George A. Trenholm should be liable on account of said guarantees and endorsements on said bonds to the extent of $400,000, and that James T. Welsman should be liable to the extent of $310,000; that George A. Trenholm and James T. Welsman should each secure to the bondholders the payment of the said bonds, and to save each the other harmless and indemnified on account of any claim by reason of the said guarantees and endorsements, beyond the proportion so agreed to be assumed by each; that each should mortgage to the other such property belonging to him as would secure each other against any claim on account of said guarantees and endorsements beyond the proportions thereof assumed by each; and would secure to the bondholders the proportion of the sums assumed by each of them, for the payment of which said proportion each would and did execute to the other a certain security, by way of mortgage; that George A. Trenholm and James T. Welsman, by a memorandum of agremeent, dated 3d May, 1869, did set forth, acknowledge and ratify said agreement, and mutually covenant for the performance thereof.

That in pursuance of said agreement and the covenants therein, George A. Trenholm and James T. Welsman, on 3d May, 1869, executed their respective deeds under seal, whereby they respectively conveyed each to the other, by way of mortgage, certain real estate; that is to say, George A. Trenholm mortgaged to James T. Welsman certain described real estate, and James T. Welsman mortgaged to George A. Trenholm certain described real estate.

That, by virtue of said deeds of mortgage, the real estate

mentioned therein became bound and liable for the ultimate payment of said bonds or obligations; and said mortgage deeds enured to the benefit of the holders of said bonds as a security for the payment of the same; and said bonds became a lien upon said real estate to the amounts due thereon.

That George A. Trenholm died 7th November, 1876, leaving a will, dated 16th September, 1869, of which he appointed his wife, Anna H. Trenholm, and his son, William L. Trenholm,
12 executors, which has been probated, and William L. Trenholm qualified as executor. By such will he devised all of his estate, real and personal, after the payment of his debts, to his wife, Anna H. Trenholm.

That George A. Trenholm left surviving him to take his estate, as his heirs at law, his wife, Anna H. Trenholm, six children, and a grand-child, daughter of a deceased daughter.

That James T. Welsman died 7th July, 1877, leaving a will, dated August, 1874, of which he appointed Wilmot G. DeSaussure, Robert N. Gourdin and Emma S. Welsman, executors,
13 which has been probated, and the three executors qualified. By such will, after sundry specific legacies, he devised the residue of his estate, real and personal, to his daughter, Caroline N. Welsman.

That James T. Welsman left surviving him, as his heir at law, his only living child, the said Caroline N. Welsman.

That Anna H. Trenholm, under proceedings for the admeasurement of her dower in the lands of which George A. Trenholm was seized in fee in his life time, has, by the decree of the Probate Court, wherein such proceedings were had, become entitled
14 to receive from his estate certain sums of money.

That Christopher F. Hampton, administrator of Frank Hampton, did, in the Circuit Court of the United States, for the District of South Carolina, on , recover a judgment against John Fraser & Co., of which firm George A. Trenholm and James T. Welsman were partners, which judgment, the plaintiff is informed and believes, is unsatisfied.

That the plaintiff is informed and believes that George A. Trenholm prior to his decease, but subsequent to the execution of the above mortgage, executed to James T. Welsman, as Ex'or
15 of James Welsman, his father, a second mortgage of his, George

A. Trenholm's three-fifths interest in the lands known as the Pavilion Hotel, and that Maria C. Otis and Emma S. Welsman, who, since the death of James T. Welsman, have qualified as Ex'ors upon the will of James Welsman, claim a lien on said premises by virtue of such second mortgage, subsequent to the lien of the mortgage first set forth.

That Theodore D. Wagner and William L. Trenholm are utterly insolvent and unable to meet any of such guaranteed bonds, or pay the same or any part, and declined and refused to do so, 16
alleging their inability and insolvency; that plaintiff has applied to the executors of George A. Trenholm, and to the executors of James T. Welsman, for the payment of such bonds out of the estates of their respective testators, and other applications have been made to them; but William L. Trenholm, Theodore D. Wagner, Wilmot G. DeSaussure, Robert N. Gourdin, Emma S. Welsman, Anna H. Trenholm, Caroline N. Welsman, Christopher F. Hampton, and the other defendants, combining with unknown persons to the injury of the plaintiff, they, the executors of George A. Trenholm and James T. Welsman refuse 17
to comply with such request, pretending that the estates of their testators, are unable to meet such guaranteed bonds, or the other claims against said estates; that the mortgaged premises cannot be sold now and the proceeds applied to the payment of such guaranteed bonds prior to other liabilities of said estates; that said bonds are not a lien on said mortgaged premises by virtue of said mortgage deeds executed as aforesaid; and that the defendants, Anna H. Trenholm and Christopher F. Hampton, administrator, have prior unsatisfied claims on said real estate, that must be paid prior to all other claims or obligations what- 18
soever. Plaintiff charges that the estates of George A. Trenholm and James T. Welsman are well able to pay such guaranteed bonds, by the sale of said mortgaged real estate, and the application of the proceeds of such sales to the payment of said bonds, which real estate, plaintiff charges, has become bound for the payment of said bonds so guaranteed, by virtue of said mortgage deeds; and that said bonds have, thereby, become a lien on said real estate to the amounts due on said bonds; that said mortgage deeds have enured to the benefit of the plaintiffs, and the holders of said guaranteed bonds; it further charges 19

that said mortgages, so interchangeably given by George A. Trenholm and James T. Welsman, and the property therein mentioned, which was intended to, and should be applied to the payment of said guaranteed bonds, would, if so applied, pay and discharge said bonds; it further charges that said mortgaged property is the only property of the estates of George A. Trenholm and James T. Welsman that can be applied, and is adequate to the payment of such bonds, and that there is no other
20 property whatsoever to said estates belonging that is adequate, and can be applied to such payment; that for aught the plaintiff knows to the contrary, Anna H. Trenholm has a right to have the sum admeasured to her for dower, paid out of said mortgaged real estate, prior to all other claims, but submit the question to the Court. Plaintiff further charges that Christopher F. Hampton's administrator has no claim or lien on said mortgaged premises prior to the lien on said bonds. The bill then prays answer to their interrogatories; those material to these appellants, are:

21

6. Whether the said George A. Trenholm and James T. Welsman did not make and execute the agreements and mortgages hereinbefore mentioned; and whether the same are not herein correctly set forth?

7. Whether the said bonds, so guaranteed as aforesaid, have not become a lien on the said mortgaged premises by virtue of the said mortgages?

22 That an account be taken of the guaranteed bonds; that the executors of George A. Trenholm and of James T. Welsman be decreed to pay what shall be justly due on such account; that in default of payment, such executors be ordered to sell the real estate of their respective testators, and the proceeds of such sales, after the payment of all liens thereon, if any such there are prior to the lien of said bonds, be applied to the payment of the sums found due on such guaranteed bonds; and all persons claiming any equity of redemption in said lands, be barred and foreclosed therefrom; and for judgment for the deficiencies.

23 Transcript, fol: 1 to 23.

Judgment pro. confesso, taken against the children of George A. Trenholm, April, 1878.

Transcript, fol. 24.

The answer of Christopher F. Hampton, administrator, filed 8th April, 1878,

Denies that the court, by means of the bill, has any jurisdiction at the instance of the plaintiff, to make answer, and pro- 24
testing against the exercise of the jurisdiction, says, he believes Theodore D. Wagner and William L. Trenholm executed certain bonds as stated, that George A. Trenholm and James T. Welsman did guarantee them, and that James Robb and Charles T. Lowndes, trustees, by endorsement transferred them, and directed payment thereof to the holders.

He knows nothing of the plaintiffs being the holders of a bond, or whether interest has been paid on it. He admits that bonds, such as described, have become due in the hands of holders, but does not know whether the plaintiff is such a holder. 25

He knows nothing of the agreement of 3d May, 1869, between George A. Trenholm and James T. Welsman, nor of anything alleged to be done under it.

He does not admit that the real estate mentioned in the mortgages between George A. Trenholm and James T. Welsman became bound for the payment of such bonds, otherwise than subject to the lien of the judgment recovered by him, and as so recognized from 1869 to the date of their death, respectively by the said George A. Trenholm and James T. Welsman.

He admits the deaths of George A. Trenholm and James T. 26
Welsman, but knows nothing of their heirs at law, except by reputation; he knows nothing, and has had no notice of Anna H Trenholm's proceedings for the admeasurement of her dower, and denies that by such proceedings she became entitled, otherwise than as subject to his judgment.

He admits that on 19th June, 1869, he recovered, in this court, a judgment against George A. Trenholm, Theodore D. Wagner, James T. Welsman and Charles K. Prioleau, as members of the firm of John Fraser & Co., upon their guaranty of the bond of George A. Trenholm; on the same day he recov- 27

ered judgment against George A. Trenholm, individually; neither of such judgments has been satisfied

He knows nothing of the mortgage of George A. Trenholm to James T. Welsman, executor James Welsman

He knows nothing of the insolvency of Theodore D. Wagner and William L. Trenholm, or of the refusal of the executors of George A. Trenholm, or of the executors of James T. Welsman to pay the plaintiff's bonds; he denies all combination, and in-
28 sists that the judgments held by him as administrator, are, and always have been, recognized by George A. Trenholm and James T. Welsman during their lives, and by their representatives since their death, to be prior liens upon the property alleged to be mortgaged, as stated in the bill.

Transcript, fol. 22 to 30.

The answer of Maria C. Otis and Emma S. Welsman, Executrixes of James Welsman, filed 16th January, 1878, says:

29 They are informed and believe, and admit to be true, that Theodore D. Wagner and William L. Trenholm, co-partners of the firm of John Fraser & Co., being in embarrassed circumstances, did, in 1867, enter into an agreement with the creditors of that firm, whereby bonds exceeding two millions of dollars were to be executed by them; such bonds to be designated A. and B. bonds, both classes to be in series; that upon the B. bonds, amounting to $710,000, they agreed to obtain personal guarantees which should be satisfactory to the trustees, James Robb and Charles T. Lowndes, but pray that the plaintiff be required
30 to produce the agreement for greater certainty in examining the conditions, and ascertaining the legal status of all the bonds issued under it, and that the trustees be made parties and required to discover the number and amount of bonds of each class and series issued, to what creditors, in what amounts, so that it may be ascertained whether the bonds that have been executed were issued by the trustees in compliance with the terms and under the powers given to them as trustees.

They are informed and believe, and admit to be true, that upon the B. bonds, amounting to $710,000 so executed, and on which
31 personal guarantees were to be obtained for the payment to the

creditors of Theodore D. Wagner and William L. Trenholm under such agreement, Geo A. Trenholm and James T. Welsman, in their life times, under their hands and seals, did endorse their joint and several guarantees, and became liable, jointly and severally, for the payment of the principal and interest of such of them as should be properly issued under the terms of said agreement.

They are ignorant of the plaintiffs holding any of said bonds and demand proof. 32

They are ignorant as to the non-payment of interest on such bonds, and demand proof.

They are ignorant of the number and amount of bonds properly issued and paid out under said agreement, and pray an account be taken, so that the true status may be ascertained.

They are informed and believe, that on 3d May, 1869, an agreement was entered into between George A. Trenholm and James T. Welsman, wherein it was stated that as between themselves, the joint and several liability as guarantors on such bonds as were endorsed under the agreement with the creditors, and which should 33 be issued in pursuance thereof, was limited on the part of George A. Trenholm as against James T. Welsman, to the sum of $400,000, and on the part of the said James T. Welsman as against George A. Trenholm, to the sum of $310,000; and they respectively covenanted, as between themselves, to hold each other indemnified for any and all payments over and above such respective sums, and respectively covenanted that each would execute to the other a mortgage of certain real estates, respectively belonging to them individually, as a security for the indemnification covenanted under said agreement; but they deny 34 such agreement and mutual covenants had any reference to creditors holding said bonds, or was intended in any way as a security for said creditors, or can, in any way, be so construed or held. They insist that it was entirely a private agreement between George A. Trenholm and James T. Welsman, for their respective protection against the payment of a larger sum, upon a debt for which each was severally liable, than was by the said agreement limited as their respective liabilities, as between themselves. They pray that plaintiff having set forth the agreement, be required to produce and prove the same, and it may be sub- 35

mitted to the Court, and its true intent, meaning and purpose may be construed according to the terms thereof.

They are informed and believe that in pursuance of said agreement of 3d May, 1869, George A. Trenholm, to indemnify and secure James T. Welsman from the payment of a larger proportion of said bonds than the proportion fixed by such agreement, as his proportion, did execute and deliver to James T. Welsman a mortgage of, and for a like purpose James T.
36 Welsman did mortgage to George A. Trenholm, certain real estate: certain real estate as set forth in the bill; but they deny that such mortgages had any reference to creditors holding the guaranteed bonds, or were in any manner or way intended as a security for such creditors, nor can they in any way be so construed or held. They insist that the mortgages were given and received by George A. Trenholm and James T. Welsman, wholly as securities to indemnify each other, as between themselves, as a protection against the payment of a larger proportion of the debt than as by the agreement was limited as their re-
37 spective liabilities between themselves. They pray that as plaintiff has set forth the mortgages, he be required to produce and prove them, that they may be examined by the Court, and their true intent, meaning and purpose be construed according to the terms thereof.

They are informed and believe, and so charge, that at the time of the execution of the B bonds, and as a part of the agreement under which they were executed, there was delivered to George A. Trenholm a large amount of securities, of the value of about $7,000, (error, original answer reads "about $700,000, and the
38 testimony says $942,808. See Transcript, fol. 103 to be by him managed and the proceeds applied to taking up the B bonds; they charge that from the proceeds of sales of such securities, a large amount of B bonds have been taken up and paid by George A. Trenholm for the common benefit of himself and James T. Welsman, and they insist that until William L. Trenholm, executor George A. Trenholm, makes an account of the sales and disposition of such securities, it is impracticable to ascertain whether George A. Trenholm or James T. Welsman have over paid their respective proportions, or to ascertain whether
39 the mortgages have become operative, or to ascertain the amount

of B bonds outstanding; and they pray that such an account be ordered as a preliminary necessary for the adjudication of these matters.

They are informed and believe, and so charge, that of the B bonds so taken up by George A. Trenholm, a large number, of considerable amount, were by him or his authority, reissued, and they insist that such reissued bonds stand upon a different legal footing from the originally issued and outstanding B bonds, and are beyond the protection of the mortgages of indemnity; they 40
pray that William L. Trenholm, executor George A. Trenholm, be ordered to make an account as a preliminary necessary for the adjudication of these matters, and the plaintiff be required to prove whether the B bonds alleged to be held by him are original or reissued bonds; that if reissued bonds, they may have all the benefits arising from such facts.

They deny "that in and by virtue of the said deed of mortgage, the real estate therein mentioned and described became bound and liable for the ultimate payment of the said mentioned bonds 41
or obligations, and that the said mortgage deeds enured to the benefit of the holders of the said bonds or obligations by way of security for the payment of the same, and that the said bonds became a lien upon the real estate to the extent of the amounts due thereon, with interest as aforesaid. On the contrary, they allege and insist that the said deeds of mortgage were only intended to be, and are only, securities by way of indemnity between the estates of the said George A. Trenholm and James T. Welsman, and inoperative until the contingencies therein provided for should occur, and they further allege and insist 42
that until the accounts called for and prayed by these defendants in paragraphs VIII and IX of this answer, are rendered and taken, it is impracticable to ascertain whether the said deeds of mortgage are operative as between these two estates, and no decree touching the same can be rendered."

They admit the death of George A. Trenholm, on 9th December, 1876, and believe the statement as to his will and its probate is true; but as plaintiff alleges it, they submit he be required to prove it.

They believe that George A. Trenholm left a widow, children 43

and grandchild, as stated; whether these are his heirs-at-law is a question for the Court.

They admit the death of James T Welsman, on 7th July 1877, leaving a will, and the statements as to such will are substantially correct.

They admit that James T. Welsman left one child, Caroline N. Welsman, whether she is his heir-at-law is a question for the Court.

44 They have heard that Anna H. Trenholm instituted certain proceedings, but are ignorant of their purpose; as the plaintiff alleges it, he should be required to prove it.

They are informed and believe that Christopher F. Hampton, administrator, obtained a judgment as stated, but are ignorant as to any payments thereof, and pray that he be required to shew such payments, if any, and what remains unpaid.

They say that George A. Trenholm, in his life time, being indebted in a large sum of money to James Welsman, their testator, and James T. Welsman, the then executor, having arranged
45 the debt with George A. Trenholm; George A. Trenholm in liquidation of it, on 13th June, 1871, executed to James T. Welsman, executor James Welsman, a bond, conditioned for $16,000, with interest at 7 per cent., payable semi-annually, in five equal successive annual instalments, the first payable 1st January, 1873, and to secure such bond, executed to him a mortgage of his, (George A. Trenholm's) three-fifths interest in the Pavilion Hotel; the mortgage is properly recorded.

They say that there is a large amount of interest in arrear on such bond; four instalments are past due and unpaid; the fifth
46 will become due 1st January, 1878.

They say that after the death of James T. Welsman they qualified as executors on the will of James Welsman.

They say that they are advised, and insist, that at the time at which George A. Trenholm executed said mortgage to James T. Welsman, executor James Welsman, the mortgage of indemnity previously given was inoperative, James T. Welsman not having then paid a larger proportion of the B. bonds than was his proportion under the agreement; they insist that at no time since the execution of such mortgage to James T. Welsman, ex-
47 ecutor James Welsman, has James T. Welsman paid a larger

proportion of B. bonds than was his proportion, and that the mortgage of indemnity never has been, and is not now operative; they pray an account to be taken, and if it is found that he has not paid a larger proportion, that the mortgage of indemnity be declared inoperative and void as against the mortgage held by these defendants as executrixes James Welsman.

They submit that James T. Welsman by taking to himself as executor James Welsman, such mortgage should be considered as having waived and postponed any and all his rights, if any he had, under the mortgage of indemnity; and they pray the Court to establish the mortgage held by them as the prior mortgage on such three-fifths of the Pavilion Hotel. 48

They answer the interrogatory part by referring to separate paragraphs of the answer.

The 6th interrogatory by paragraphs VI and VII.

The 7th interrogatory by paragraphs VIII, IX and X, and by denying that the said bonds so guaranteed have become a lien upon the said mortgaged premises by virtue of said mortgages; and by paragraphs XVII, XIX and XX, claiming that they hold the only operative lien or mortgage upon the three-fifths interest in the property described as the Pavilion Hotel. 49

Transcript, fol. 30 to 57.

The answer of Wilmot G. DeSaussure, Robert N. Gourdin and Emma S. Welsman, executors James T. Welsman, filed 31st December, 1877, says:

That their testator died 7th July, 1877, and by the statute law of South Carolina no suit can be brought against them in regard to the estate of their testator until nine months after his death, nor judgment against them as executors be obtained until a year after his death. They claim the benefit of these statutory provisions, and that this suit be delayed till the lapse of such periods. 50

Protesting that they are not bound at this time to answer, and not waiving the exemptions secured by statute; they say that there was at the time of the filing of this bill an action pending in the Circuit Court for Charleston County, S. C., in all respects identical with this bill, the difference being that in such action William L. Trenholm, executor, is plaintiff, and in this bill is 51

defendant. In the former, George W. Williams and Anna W. Alston, as representatives of the bond holders are defendants in this suit, I. L. Phipps claiming to represent such bonds is the plaintiff. The complaint of William L. Trenholm, executor, was filed 1877, and served on these defendants on day of the same month; on 21st August, 1877, these defendants asked of said William L. Trenholm a full account of all transactions between their testator and George A. Trenholm
52 in regard to the guaranteed bonds, and while withholding their answer, because of a notice from plaintiff's solicitor that he would amend his bill, the plaintiff filed this bill, and erroneously states that there was an agreement between James T. Welsman and George A. Trenholm, to secure to the bond holders the payment of said bonds, which these defendants deny. They submit that all proceedings in this bill be stayed till said action pending in the State Court be decided.

Protesting that they are not bound to answer until the action in the State Court is decided, and waiving no right thereby, they
53 say they believe it to be true that Theodore D. Wagner and William L. Trenholm, partners in the late firm of John Fraser & Co., did at the time of their failure, about 1867 or 1868, execute to the trustees named in the bill, their certain bonds, conditioned for $710,000, known as B. bonds, and certain other bonds conditioned for $135,000, known as C. bonds; said bonds were issued as part of the compromise with the creditors of the firm. George A. Trenholm and James T. Welsman, both now dead, who were formerly, but not at the time of the failure of the firm, members of said firm, did guarantee the payment of both
54 classes of said bonds.

They are ignorant whether the plaintiff is a citizen of New York, and a holder of any of the bonds, and require proof.

That in the action in the State Circuit Court, the proportions of liabilities between George A. Trenholm and James T. Welsman, are stated to be four-sevenths and three-sevenths, instead of forty seventy one parts, and thirty-one seventy one parts, as stated in this bill; and as the means of information of William L. Trenholm, executor George A. Trenholm, is necessarily greater than that of the present plaintiff, these defendants accept
55 his statement as the correct one, and if there is any liability on

the estate of their testator, they pray strict proof by this plaintiff.

They say it is true, that George A. Trenholm and James T. Welsman, to save each other harmless on account of their guarantees, beyond the proportions agreed to be assumed by each, did mortgage certain property, each to the other, but they deny that such mortgages were given "to secure to the bondholders the payment of the said bonds," as stated in the bill.

They are advised that, in certain contingencies, the bond- 56
holds may, perhaps, have had a right to be subrogated to the rights of the mortgagees respectively. But, denying such right of subrogation, they say that, at the utmost, the creditors have only an equity to be so, and cannot claim that the interchangeably mortgaged real estate be sold, till all the accounts and equities between George A. Trenholm and James T. Welsman are adjusted. That, in fact, the bondholders can claim nothing from the estate of George A. Trenholm, by virtue of said mortgage, till they show that the estate of James T. Welsman is entitled to make such claim, and then only to the amount, and 57
no more, that the said estate could make such claim, and *vice versa*.

They admit the statements as to the deaths of George A. Trenholm and James T. Welsman, their wills, and families. Of the proceedings of Anna H. Trenholm for dower, they know only by hearsay, and require proof. They cannot admit that Theodore D. Wagner and William L. Trenholm, the principals on the guaranteed bonds, are insolvent and unable to meet said bonds. On the contrary, they know and believe both to be engaged in mercantile business. William L. Trenholm, espe- 58
cially, in business begun on a capital of $200,000, and reported to be large and lucrative. They deny this allegation, and require proof.

They deny that, as between themselves, George A. Trenholm and James T. Welsman, in their life times, or now their estates, are primarily liable for the guaranteed bonds. On the contrary, they say that a large amount of securities, of the value of $630,000, perhaps $900,000, were put under the control of George A. Trenholm, to secure himself and James T. Welsman, and their estates respectively, from loss, and it was only after 59

the exhaustion of these securities that there was, as between themselves, to be any liability upon them, and then in the proportion stated in the complaint of William L. Trenholm, executor.

They are informed, and believe, that George A. Trenholm, in his life time, called in a large amount of these securities, and sold others, thus obtaining a large sum of money, and, by lending out this at large interest, made large gain and profit there-
60 out. So far as they know, no full, consecutive account of these collaterals was rendered by George A. Trenholm in his life time, nor by his executor since his death, but only fragmentary accounts, which, they learn, were unintelligible to James T. Welsman, and are to them, and do not show what moneys came into George A. Trenholm's hands from the calling in, selling, and lending out of the money.

They say that, since the guaranteeing of the bonds, their testator paid George A. Trenholm $89,000, to be applied to the extinguishment of the bonds.

61 That from the moneys derived from the securities and from James T. Welsman, George A. Trenholm, in his life time, and his executors, since his death, as they are informed, and believe, bought a large amount of the B and C bonds at a large discount; and it is also said that he directly, or indirectly, through his late firm, bought a large amount of the bonds with his own money. They submit that their testator's estate is chargeable only with the *pro rata* actually paid for the bonds, and no more.

They are informed, and believe, that George A. Trenholm reissued, or caused to be reissued, a large amount of the bonds
62 bought by him, and which should have been cancelled. They submit that their testator's estate is not responsible for such reissued bonds, if any, and that, *pro tanto*, the mortgage on the real estate of George A. Trenholm and James T. Welsman is satisfied.

They submit that it is impossible for them, or the Court, to proceed in this case, till the executor of George A. Trenholm submits a full account, showing of what the collaterals consisted, what disposition was made of them, what bonds were bought with their proceeds, or with the moneys of George A. Trenholm
63 or James T. Welsman, what bonds were reissued, and what bonds extinguished.

To the seventh interrogatory, they deny that said bonds have become a lien on the mortgaged property.

They know nothing of George A. Trenholm's estate, but believe it to be ample. Till the account is made, they can say nothing of the condition of James T. Welsman's estate.

Transcript, fol. 57 to 72.

The answer of William L. Trenholm in his own right, as surviving partner of George A. Trenholm & Son, and as executor of George A. Trenholm, filed 4th January, 1878, says: 64

It is true that George A. Trenholm died, as stated in the bill, leaving a will, on which he has qualified as executor; also, that a partnership existed between himself and George A. Trenholm, under the name of George A. Trenholm & Son, and the winding up of the business, as well as the administration of the private estate of George A. Trenholm, has devolved on him.

He substantially admits to be true the statements as to John Fraser & Co., the guaranteeing by George A. Trenholm and James T. Welsman of the B and C bonds; that this was in accordance with an agreement with the creditors of John Fraser & Co., and to secure the A bonds he and Theodore D. Wagner executed to James Robb and Charles T. Lowndes, as trustees, a mortgage of all their real estate. 65

That when George A. Trenholm and James T. Welsman guaranteed the B and C bonds, the firm of John Fraser & Co. held assets nominally of large value, only a portion of which had any fixed value. For greater particularity he refers to such statements as were kept under the direction of George A. Trenholm, copies of which, he believes, were furnished to James T. Welsman. Beyond these statements he has no information. 66

When George A. Trenholm and James T. Welsman guaranteed the B and C bonds, they agreed between themselves that George A. Trenholm should assume and pay four-sevenths, and James T. Welsman three-sevenths thereof. And to secure to the holders of the said bonds the payment of their proportions, and so protect and indemnify each other against any liability for any greater portion or share of said bonds than the parties respectively assumed, George A. Trenholm and James T. Welsman did each execute to the other, a mortgage of real estate, he 67

believes correctly stated in the bill, but for greater particularity refers to the original papers in his hands as executor, and in the hands of the executors of James T. Welsman.

He says he has always understood that during the life time of James T. Welsman, he always admitted a liability from him to George A. Trenholm, on account of the advances made by George A. Trenholm, being greater than the proportion of the bonds guaranteed by him, that is four sevenths; and that James
68 T. Welsman did offer to surrender all of the property mortgaged by him in satisfaction of the claim made on him to contribute and pay the proportion of the whole amount of the said guaranty so assumed by him.

That to relieve George A. Trenholm from the large amounts of B and C bonds so guaranteed, George A. Trenholm & Son, did, from various persons, make loans of divers sums of money, which were invested in the purchase of a large amount of said bonds, and which bonds became, and constitute, a large portion of the assetts of George A. Trenholm & Son, and applicable to
69 the debts of said copartnership.

He believes it to be true as stated in the Bill, that the mortgage by George A. Trenholm and James T. Welsman, to each other, were made by them as mortgages for the benefit of the holders of said bonds, if they were not paid by the principal obligors, in consequence whereof, the said guarantors would become liable. And therefore, the plaintiff, and all holders of such bonds, are of right entitled to the benefit of the property set forth in said mortgages to secure the payment of said bonds now outstanding, so far as may be necessary for that purpose,
70 in the proportion of the aggregate of such outstanding bonds agreed upon by George A. Trenholm, and James T. Welsman, to be assumed by each, that is, four sevenths for George A. Trenholm, and three sevenths for James T. Welsman, as well as to secure this Defendant as Executor George A. Trenholm, all such sums as may have been advanced by George A. Trenholm on account of said bonds, beyond the proportion for which, as was agreed upon, he should be liable. The remaining three sevenths were undertaken by James T. Welsman, to be paid by him, being that which by the agreement, he was bound to pay,
71 and so to secure the payment of that portion to the holders of

said bonds, and in so doing protect George A. Trenholm from any liability, therefore James T. Welsman executed to George A. Trenholm the mortgage stated in the bill.

He admits the proceedings by Anna H. Trenholm, to have her dower admeasured, and the same has been ascertained, as will appear by the proceedings:

He is anxious to have all the matters settled, all parties holding said bonds called in, and the executors of James T. Welsman decreed to pay the proportion for which James T. Welsman became bound by the agreement with George A. Trenholm; that this defendant be decreed to pay the proportion of George A. Trenholm; and also that for all such sums as George A. Trenholm advanced over his proportion, and thereby relieved James T. Welsman from so much liability on account of said bonds, the executors of James T. Welsman be decreed to pay defendant, as executor George A. Trenholm, and in default of payment the property of all kinds mentioned in both mortgages be sold, and the proceeds applied in the proportion for which they agreed between themselves, and the repayment of George A. Trenholm's advances 72 73

To the seventh interrogatory he says he has always so understood.

Transcript, fol. 73 to 86.

On 11th March, 1878, the plaintiff filed a replication, averring the bill to be true, and that the answers are uncertain, untrue and insufficient to be replied to. 74

Transcript, fol. 87 to 89.

On 6th May, 1878, Christopher F. Hampton, administrator, filed an exception to the jurisdiction. And on the same day the exception was overruled.

Transcript, fol. 89 to 91

On 6th May, 1878, an order was made appointing Samuel Lord, Jr., Special Master, with directions to call in the parties interested in the guaranteed bonds; and to enquire and report 75

on all issues of law and fact involved, and more especially the nature, priority and order of the liens securing such bond, and to report any special matter.

The executor of Geo. A. Trenholm, and the executors of James T. Welsman, were ordered to account before him, as to the administration of the respective estates.

The Special Master was ordered to report his conclusions of law and fact as presented to him, and with his report, file the testimony brought before him.

76

Transcript, fol. 92, 93.

Report of Samuel Lord, Jr., special master, filed 30 January, 1879, the date does not appear in the Transcript.

The report finds as facts:

That John Fraser & Co., of Charleston, and Fraser, Trenholm & Co., of Liverpool, associated firms, failed in 1867; for a settlement with the creditors of these firms, Theodore D. Wagner and William L. Trenholm, two of the copartners, exe-
77 cuted a memorandum of agreement, the third article of which provided that Theodore D. Wagner and William L. Trenholm should execute bonds for the aggregate sum of $710,000, secured by a personal guarantee and endorsement, to be approved by James Robb and Charles T. Lowndes, who in the second article had been named as Trustees for the creditors.

In pursuance of the agreement, Theodore D. Wagner and William L. Trenholm, executed to the trustees their bonds of various amounts, dated 1 January, 1868, and aggregating $710,-
78 000. These were divided into four series, each for $177,500, payable 1 January, 1870, 1871, 1872, 1873; all bearing 6 per cent. interest, payable 1 January, 1870, and thereafter annually on 1 January in each year.

On all these bonds George A. Trenholm and James T. Welsman endorsed a joint and several guarantee, under their hands and seals, and bound themselves for their payment as they became due, and the interest which might accrue; these were designated as B bonds to distinguish them from A bonds, another class executed by Theodore D. Wagner and William L. Tren-
79 holm, and secured by a mortgage or assignment of real estate.

By a supplemental agreement, on 16 December, 1868, between John Fraser & Co., and Fraser, Trenholm & Co., and certain of their creditors, it was provided that the joint obligation of George A. Trenholm and James T. Welsman should be given to make good an unexpected deficiency in the assets of these firms. This class was designated as C bonds and amounted in the aggregate to $101,448. When this class was executed, William L. Trenholm and Theodore D. Wagner delivered to John E. Philips a large amount of securities, the property of John Fraser & Co., 80
to be managed by him as Trustee, and applied to the payment of the B and C bonds; while he was the custodian of these assets, they were, in fact, under the management and supervision of George A. Trenholm; his executor has fully accounted for these. A statement accompanies the report: from it, it appears that these collaterals realized $395,232. The assets remaining, according to the testimony of William L. Trenholm, are of no value.

At the time of the execution of the guarantees and endorsements of the B bonds, it was agreed between George A. Tren- 81
holm and James T. Welsman as between themselves, that George A. Trenholm should be liable on account of said guarantees to the extent of $400,000, and James T. Welsman to the extent of $310,000; and for the C bonds George A. Trenholm should be liable for forty of seventy-one parts, and James T. Welsman for thirty-one of seventy-one parts thereof, and that each should save and keep harmless and indemnified the other from all claim beyond the amount or proportion by each respectively assumed. On 3 May, 1869, they entered into articles of agree-
ment, acknowledging and ratifying the above understanding, 82
and on the same day interchangeably executed and delivered to each other the mortgages referred to in the bill. Printed copies of these mortgages were annexed to the report.

George A. Trenholm died 17 November, 1876, (a mistake for 9 December, 1876), leaving a will dated 16 September, 1869, of which he appointed his wife Anna H. Trenholm, and his son, William L. Trenholm, executors. His will has been probated, and William L Trenholm qualified as executor thereon; by it he devised all his estate, real and personal, after payment of his debts, to his wife, Anna H Trenholm. The heirs at law of 83

George A. Trenholm are correctly stated in the bill, except that Mrs. Morgan's name was Anna Helen, not Emily St. Pierre.

James T. Welsman died 7 July, 1877, leaving a will, of which he appointed Wilmot G. DeSaussure, Robert N. Gourdin and Emma S. Welsman, executors, all of whom qualified; by it after sundry specific legacies, he devised all the residue of his estate to Caroline Welsman, his only living child.

84 Theodore D. Wagner and William L. Trenholm are both insolvent; the personal estate of James T. Welsman is of little or no value, and his real estate, not embraced in the mortgage to George A. Trenholm, does not exceed in value $8,000, or $10,000.

According to the testimony of the executor of George A. Trenholm, his personal estate cannot be estimated at more than $25,000, or $30,000, and his real estate, not embraced in the mortgage to Welsman, does not exceed $20,000.

Of the C bonds, the entire issue has been retired, or provided for.

85 B bonds remain outstanding to the amount of $680,145, a part of which belong absolutely to the present holders, and a part are held as collateral security. The claims against these bonds, according to a statement of William L. Trenholm, is $464,846, exclusive of interest.

A statement of payments of B and C bonds is made, and the result reached is:

"The excess of payments over receipts from collaterals is $108,454 00

86 "Which latter amount has been paid by Mr. Trenholm out of his individual means."

"The amount due upon the B bonds now outstanding, is, according to the testimony of Mr. W. L. Trenholm, exclusive of interest $464,846 00

"Add to this amount the payments made by Mr. Trenholm 108,454 00

"And we have as the amount to be contributed by

87 his sureties $573,000 00

"Of this amount the estate of Mr. Trenholm is liable for	$322,986 00
" Less amount paid	108,454 00
" Leaving due by that estate	$214,532 00
" The estate of Welsman is liable for	$250,314 00

The bonds produced and proved, exclusive of interest, are:

B bonds proved by original holders	$178,888 89	88
B bonds proved by persons holding them as collateral securities, for notes amounting in the aggregate to $, exclusive of interest . . .	457,501 97	
Total B bonds produced and proved . . .	$636,390 86	

On 19th June, 1869, Christopher Hampton, administrator, recovered judgment in this Court against John Fraser & Co. and George A. Trenholm, each, for $109,043.25.

On 13th June, 1871, George A. Trenholm mortgaged to James 89
T. Welsman, executor of James Welsman, to secure a bond of that date for $16,480, payable in five equal annual instalments, the first on 19th January, 1873, three undivided fifth parts of the Pavilion Hotel; this property is embraced in the mortgage from George A. Trenholm to James T. Welsman.

In January, 1873, Mr. Trenholm rendered to Mr. Welsman a statement, shewing that, up to that time, he had taken up B bonds to the amount of $125,766. On each of the bonds so taken up, Mr. Welsman placed this endorsement: "The pro- 90
portion of the within bond, for which, the within bound, James T. Welsman is liable; that is to say, thirty-one of the seventy-one parts thereof have been paid by George A. Trenholm. For that sum, with interest, James T. Welsman is indebted to George A. Trenholm, and the mortgage from James T. Welsman to George A. Trenholm, bearing date May 3d, A. D. 1869, and recorded in the Mesne Conveyance office, Charleston County, in Book H, No. 15, page 571, is acknowledged by James T. Welsman to be security for the same to the said George A. Trenholm, or his assigns.

On 10th November, 1873, Mr. Trenholm by letter informs 91

Mr. Welsman, that since the above statement, he had further redeemed, partly in cash, and partly by issue of notes, $113,992.12 of said bonds; Welsman's share of which is $48,852, making with the above, $102,752.

On 13th March, 1875, Mr. Trenholm, by letter, replying to one from Mr. Welsman, states the amount then due him by John Fraser & Co., (error for James T. Welsman, see original letter,) could not be less than $200,000, and proposes to take
92 from Welsman, $66,000 in full of all demands against him; $50,000 in cash, and $16,000 in Trenholm's bond, held by Welsman, executor James Welsman.

This offer, with some modifications, was accepted, but in consequence of Welsman's inability to send the cash, the proposed settlement was never carried into effect.

After the death of Mr. Trenholm, negotiations were resumed by his executor, and Mr. Welsman, by letter of 25th January, says he admits the indebtedness, and there is only one mode in which he can expect to discharge; and offers to transfer the
93 mortgaged property, upon being discharged from further liability on these bonds. This offer was accepted, proceedings were had in the Probate Court, and an order made to confirm it; the executor of George A. Trenholm was placed in possession, but differences as to details arising, James T. Welsman died without having executed the proposed conveyances.

The bill is filed by plaintiff in behalf of himself and other bond holders, to obtain a foreclosure of the mortgages executed by Trenholm and Welsman. "*It is framed upon the theory that the mortgages were intended to secure payment of these bonds, and*
94 *the bonds became a lien thereby upon the mortgaged premises, to the extent of the amounts due thereon. This claim cannot, in my judgment, be sustained. After a careful examination of the mortgages and the agreement which they secure, I can find nothing to warrant the conclusion that they were executed for the purpose of securing the bonds, or conferring a distinct and independent lien on the holders thereof. The intent of these instruments is to pledge the real estate mentioned in the mortgages, for the performance of the covenants contained in the agreement of the same date, and to indemnify each of the covenanters against any breach of the cove-*
95 *nants on the part of the other. As the Court cannot consider the*

instruments as giving a lien beyond this intent, it follows that the bond holders have no lien of their own; the most that they can claim is to be subrogated to the rights of their debtors, and to assert a quasi right by administering the equities between Welsman and Trenholm."

The report then discusses the question of subrogation, and reaches the conclusion, "the present case falls clearly within the reason of the rule;" that "equity will permit the creditors to proceed, in the first instance, against the mortgaged property, to 96
enforce it to the same extent that the mortgagee could have enforced it had he been compelled to pay the entire debt."

The executors of James Welsman, and Christopher F. Hampton, administrator, claim that these mortgages were simply to indemnify Welsman and Trenholm from over-payment, and inasmuch as neither has, in fact, overpaid his stipulated proportion of the bonds, neither they, nor the creditors who claim through them, have the right to enforce the mortgages.

This contention appears to be based upon a misapprehension of the scope and intent of these instruments. That Trenholm 97
and Welsman did not regard these mortgages as having been given simply for the purpose of indemnity, is evident from the endorsement made by Welsman, in January, 1873, upon the bonds then paid by Mr. Trenholm. This endorsement clearly recognizes the Welsman mortgage as a security in the hands of Trenholm and his assigns, for Welsman's proportion of the money so advanced by Trenholm, to pay these bonds, though the amount fell short of $400,000. The parties having given a practical construction to the contract, that construction will be 98
enforced.

The language of the mortgages will not sustain the construction contended for. They are conditioned not for the indemnity of Welsman and Trenholm, but for "the performance of the covenants, agreements, and understanding contained in the memorandum of agreement." Those covenants are "that Trenholm should be liable for the full discharge of $400,000, and Welsman for the full discharge of $310,000, of the guaranteed bonds, and that they should indemnify each other against the payment of more than the amounts and proportions thus agreed 99
upon." The object contemplated was obviously not simply in-

demnity. The mortgages were intended as a security for the payment by each of the guarantors of the amount which he had assumed. Until this was done, the mortgages constituted liens on the mortgaged property, and it was not in the power of either of the guarantors, *without the consent of the other*, to create a junior lien which should take precedence of them.

Where creditors claim the benefit of a mortgage through the equities of a mortgagee, it is well established that they can only
100 claim what the mortgagee, to whose right they are subrogated, could have claimed. According to this rule, the bondholders can only claim out of the Trenholm mortgage the proportion of the bonds he assumed to pay.

The principal debtors are in bankruptcy; the liability of the guarantors has become absolute; their estates are not in condition to pay the bonds.

The schedule shows,

Bonds in hands of original holders, to be	$178,888 89
Bonds holden by persons as collateral securities . .	457,501 97

101

Transcript, fol. 139 to 152.

A subsequent report was made in relation to the claim for dower.

Transcript, fol. 152 to 167.

To the first report exceptions were filed on by Christopher F. Hampton, administrator.

102

Transcript, fol. 167 to 170.

And on 3d January, 1879, exceptions were filed by the executors James Welsman.

The first is to the effect that the mortgages between George A. Trenholm and James T. Welsman were "for protection against the overpayment of amounts so ascertained between themselves, and were indemnities between them only, and did not enure as securities for the bondholders, and that under no
103 principles of equity are, or can the bondholders be held entitled to the principle of subrogation in this case."

The second, to the effect that on 13th June, 1871, James T. Welsman not having paid any part of the B bonds, was not in advance of the amount agreed, undertaken to be paid by him under the agreement, and not entitled to any benefit under the mortgage to him; and the execution to him as executor of James Welsman on that day, by George A. Trenholm, of three-fifths of the Pavilion Hotel, was the creation of a valid lien upon the property on which there was then no valid subsisting lien, and such mortgage being made with the full concurrence 104
and consent of both guarantors, created a lien in preference to the indemnity mortgage, and was a waiver by James T. Welsman of any and all claims for precedence under the indemnity mortgage.

The third, to the effect that there being B bonds outstanding to the amount of $178,888.89 only, in the hands of original parties, forty seventy-one parts of that amount only could, under any circumstances, be chargeable against George A. Trenholm; that of such amount, $11,936.40 is in the hands of George A. Trenholm & Son, of which George A. Trenholm, the guarantor, 105
was chief partner, and should be regarded as extinguished; and that James T. Welsman, according to the testimony, having paid no part of the B bonds, there was no equity which he could enforce against George A. Trenholm, and consequently no right or equity through him to which the bondholders as creditors could be subrogated, or under which they could claim as against the exceptors.

The fourth, to the effect, that that of the B bonds proved before the Master, $457,501.97 were held as collaterals; that these were bonds which had been taken up and reissued by George A. 106
Trenholm; and, as so reissued, are not entitled to any rights or equities prior to the rights of the exceptors under the mortgage held by them; that if the bondholders have any right to be subrogated by such reissue, their rights are postponed to the rights of the exceptors; that as to these exceptors, when such bonds came into the hands of George A. Trenholm, they were extinguished as regarded the mortgage of the exceptors, and the holders of such reissued bonds, if any, commenced, if at all, only from the dates of such reissue.

The fifth, to the effect, that the testimony showed that James 107

T. Welsman not only was not entitled to any benefit under the indemnity mortgage to him, because he was far behind in his payment, and largely indebted to George A. Trenholm for overpayments, but it also showed that his estate could not pay, and could, by no possibility, become entitled to any benefit under such mortgage; he therefore had no equity against George A. Trenholm, and hence, as to the mortgage held by the exceptors, there neither was, nor could be, any equity to which the bond-
108 holders could be subrogated.

The sixth, to the effect, that Mrs. Trenholm, having renounced dower on the mortgage held by the exceptors, is entitled to dower only in the surplus of sale, if any.

Transcript, fol. 171 to 179.

By a consent order, 3d March, 1879, the property was sold, the proceeds to be held subject to the future order of the Court.

Transcript, 216 to 225.

109 On 29th May, 1879, a decree was made, overruling the exceptions, and confirming the report, and the Master ordered to pay out the proceeds of sale of the property.

Transcript, fol. 225 to 228.

On the same day, notice of appeal was given in open Court, by Christopher F. Hampton, administrator, and by the executors of James Welsman.

Transcript, fols. 228, 229.

110 The further proceedings on these appeals appear.

Transcript, fol. 229 to 242,

The guarantee does not appear in the transcript, but, as copied from one of the B. bonds, it is as follows:

"For value received, we hereby jointly and severally guarantee the payment of the within bond.

Witness our hands and seals, this first day of January, one thousand eight hundred and seventy-eight.

G. A. TRENHOLM, [L. S.]

111 J. T. WELSMAN. [L. S.]

The plaintiff produced in evidence the agreement between George A. Trenholm and James T. Welsman, and also the indemnity mortgages between them.

Transcript, fol. 93.

The agreement is printed; transcript, fol. 179 to 187.

The mortgages are printed; transcript, fol. 188 to 216.

112

William L. Trenholm, a witness produced by the plaintiff, testifies as to the accounting between George A. Trenholm and James T. Welsman, in relation to the payment by George A. Trenholm on the B. bonds, that the indebtedness of Welsman to Trenholm is large; "But I estimate it to be, in any event, considerably over $200,000; largely over that."

Transcript, fol. 102, 110, 137½.

Q. Has Mr. James T. Welsman, or his estate, ever paid $310,000 for the redemption of the B. bonds?" 113

A. "No, sir."

Transcript, fol. 133.

The testimony as to reissued B. bonds, will be found in various places.

See statement by special master; transcript, fol. 151.

Testimony, transcript, fol. 113 to 119, 133 to 135.

114

The above statement, is a full abstract of the pleadings, report, &c., and is made for the convenience of the Court, and can be verified by the transcript, as referred to.

The points submitted for adjudication will be stated in the argument.

ARGUMENT.

The Bill is based upon the assumption, that by the agreement between George A. Trenholm and James T. Welsman, of 3d May, 1869, in regard to the guaranteed bonds, they agreed 115

that they "should each secure to the bondholders the payment of the said bonds, and to save each other harmless on account of any claim by reason of the said guarantees and endorsements, beyond the said proportions agreed to be assumed by each: that each should convey to the other, by way of mortgage, such property to him belonging, as would secure each other against any claim on account of the said guarantee and endorsements beyond the said proportion thereof assumed by each; and would
116 secure to the holders of the said bonds the proportion of the sums assumed by each of them, the said George A. Trenholm and James T. Welsman," &c. Transcript, fol. 7.

"That in and by virtue of the said deeds of mortgage, the said real estate therein mentioned and described, became bound and liable for the ultimate payment of the said mentioned bonds or obligations: and that the said mortgage deeds enured to the benefit of the holders of the said bonds or obligations, by way of security for the payment of the same: and that the said bonds became a lien upon the said real estate to the extent of
117 the amount due thereon, with interest as aforesaid." Transcript, fol. 15.

"Which said real estate, as your orators charge, has become bound for the payment of the said bonds so guaranteed as aforesaid, by virtue of the said mortgage deeds; and that the said bonds have thereby become a lien on the said real estate to the extent of the amount due on the same, with interest as aforesaid; and that the said mortgage deeds have enured to the benefit of your orators, holders of the bonds so guaranteed, as aforesaid." Transcript, fol. 18.

118 And prays answer to interrogatory 7, "Whether the said bonds, so guaranteed, as aforesaid, have not become a lien on the said mortgaged premises by virtue of the said mortgages." Transcript, fol. 20.

The assumptions and allegations of the Bill are denied by these appellants: Christopher F. Hampton, Administrator and appellant, denies.

"This defendant does not admit that the real estate mentioned in the mortgages which are described in the bill between George A. Trenholm and James T. Welsman, became bound for
119 the payment of said bonds or obligations, otherwise than subject

to the lien of the judgments which this defendant recovered in this Court, as mentioned in the bill, and as so recognized from 1869 to the date of their death, respectively, by the said George A. Trenholm and James T. Welsman. Transcript, fol. 27.

The executors of James Welsman, appellants, deny,

"VI. And these defendants, further answering, say that they are informed and believe, that some time about 3d May, 1869, an agreement was made and entered into between the said 120
George A. Trenholm and James T. Welsman, wherein it was stated that as between themselves, the said George A. Trenholm and James T. Welsman, the joint and several liability as guarantors on such bonds as were endorsed by them under the aforesaid agreement with the creditors, and which should be issued in pursuance of the terms thereof, was limited on the part of the said George A. Trenholm, as against the said James T. Welsman, to the sum of $400,000, and on the part of the said James T. Welsman, as against the said George A. Trenholm, to the sum of $310,000, and they respectively, as between them- 121
selves, covenanted to hold each other indemnified for any and all payments over and above such respective sums and amounts, and also respectively covenanted that each would execute to the other a mortgage of certain real estates respectively belonging to each of them individually, as a security for the indemnification covenanted under the said agreement; but these defendants deny that such agreement and mutual covenants had any reference to creditors holding the said bonds, or any of them, or was intended in any manner or way as a security to or for the said creditors, or any of them, or can in any way be so construed or 122
held, and insist that the same was entirely a private agreement between the said George A. Trenholm and James T. Welsman for their respective protections against the payment of a larger sum or amount upon a debt for which each was severally liable, than was by the said agreement limited as their respective liabilities as between themselves, the said George A. Trenholm and James T. Welsman."

"VII. That they are informed and believe, that in pursuance of the said agreement of the 3d May, 1869, the said George A. Trenholm, to indemnify and secure the said James T. Wels- 123

man from the payment of a larger sum, amount or proportion of the said bonds so as aforesaid jointly and severally guaranteed, than the sum, amount or proportion fixed by the said agreement as the share or proportion of him, the said James T. Welsman, did execute and deliver to the said James T. Welsman, a deed of mortgage of certain real estate, as set forth in the Bill, and for like purpose, the said James T. Welsman did execute and deliver to the said George A. Trenholm, a deed of
124 mortgage of certain real estate, as set forth in the complaint; but these defendants deny that such mortgages had any reference to creditors holding the said bonds, or any of them, or were intended in any manner or way as security to or for the said creditors, or any of them, or can in any way be so construed or held. And they insist that the said mortgages respectively, were entirely given and received, and held by the said George A. Trenholm and James T. Welsman, as securities to indemnify each the other, and as between themselves, as a protection against the payment of a larger sum or amount upon a debt for which
125 each was severally liable, than was by the said agreement limited as their respective liabilities, as between themselves, the said George A. Trenholm and James T. Welsman."

"X." They deny, "that in and by virtue of the said deeds of mortgage, the said real estate therein mentioned and described, became bound and liable for the ultimate payment of the said mentioned bonds or obligations, and that the said mortgage deeds enured to the benefit of the holders of the said bonds or obligations, by way of security for the payment of the same, and that the said bonds became a lien upon the said real estate
126 to the extent of the amounts due thereon, with interest as aforesaid: on the contrary, they allege and insist that the said deeds of mortgage were only intended to be, and are only securities by way of indemnity between the estates of the said George A. Trenholm and James T. Welsman, and inoperative until the contingencies therein provided for should occur, and they further allege and insist that until the accounts called for and prayed by these defendants, in paragraphs VIII and IX, of this answer, are rendered and taken, it is impracticable to ascertain whether the said deeds of mortgage are operative as between
127 those two estates, and no decree touching the same can be rendered."

7. The seventh interrogatory they answer by paragraphs VIII, IX and X, of this answer, and by denying that the said bonds so guaranteed, as aforesaid, have become a lien upon the said mortgaged premises by virtue of the said mortgages; and also by paragraphs XVII, XIX and XX, of this answer, claiming that these Defendants hold the only operative lien or mortgage upon the three fifths interest in the property described as the Pavilion Hotel."

Transcript, fol. 37 to 40, 44, 45, 53. 128

The Special Master in his report says:

"The bill in this case has been filed by the plaintiff on behalf of himself and all other holders of the B bonds, to obtain a foreclosure of the mortgages executed by Welsman and Trenholm. *It is framed upon the theory that the mortgages were intended to secure payment of these bonds, and that the bonds became a lien thereby upon the mortgaged premises to the extent of the amount due thereon. This claim can not, in my judgment, be sustained. After a careful examination of the mortgages and the agreement which they secure, I can find nothing to warrant the conclusion that they were executed for the purpose of securing the bonds, or conferring a distinct and independent lien on the holders thereof. The intent of these instruments is to pledge the real estate mentioned in the mortgages for the performance of the contracts contained in the agreement of the same date, and to indemnify each of the covenantors against any breach of the covenants on the part of the other. As the Court can not consider the instruments as giving a lien beyond this intent, it follows that the bondholders have no lien of their own.*" 129 130

Transcript, fol. 146.

The plaintiffs filed no exceptions to the Special Master's Report.

The Circuit Judge says:

"This cause having come on to be heard on the report of the Special Master, Samuel Lord, Jr., herein filed, and the exceptions to the same, and counsel on all having been heard: Now, after full consideration of the same, it is ordered and decreed, that the 131

said exceptions be overruled, and the said reports stand confirmed."

Transcript, fol. 225.

From this decree the plaintiffs have not appealed.

The prayer of the plaintiffs' bill is:

"That an account may be taken of the principal sums and interest remaining due unto your orators respectively, as holders
132 of the bonds or obligations so guaranteed as aforesaid, *on the security of the said mortgaged premises;* and that the defendants, William L. Trenholm, as executor of the said George A. Trenholm, and Wilmot G. DeSaussure and Robert N. Gourdin and Emma S. Welsman, as executors of the said James T. Welsman, may be decreed to pay unto your orators, respectively, what shall appear to be justly due and owing to them on the taking of the aforesaid account, together with the costs of this suit; and that in default of such payment, the said William L. Trenholm, Wilmot G. DeSaussure, Robert N. Gourdin and Emma S. Wels-
133 man, may be ordered to sell the real estate of their respective testators, at such times and on such terms, and in such manner, as to your Honors shall seem meet and proper; and that the proceeds of sale, after payment of all liens, if any thereon *prior to the lien of the said bonds*, be applied to the payment of the amounts so found due to your orators, on the taking of the said account; and that the defendants, and all persons claiming under them, or either of them, be absolutely and forever debarred and foreclosed of and from all or any right, title, interest or equity of redemption of, into or concerning the said mortgaged prem-
134 ises, and every and any part thereof, and that your Orators respectively have leave to enter up judgment against the said William L. Trenholm, as executor of the said George A. Trenholm, and the said Wilmot G. DeSaussure, Robert N. Gourdin, and Emma S. Welsman, as executors of the said James T. Welsman, for any deficiency that may remain due to them, and each of them respectively on said account after the application of the said proceeds of sale to the same; *and* that your Orators may have such other and further relief in the premises as the nature of the circumstances of this case may require, and to your
135 Honors shall seem meet."

Transcript, fol. 22.

As will be seen, the prayer is entirely in the conjunctive, and framed wholly on the theory that the guaranteed bonds, by virtue of and under the agreement and indemnity mortgages, became a lien thereby upon the mortgaged premises to the extent of the amount due thereon.

To the bill, no creditors of George A. Trenholm or James T. Welsman, (except the executors of James Welsman, and they only, because claiming a mortgage upon a part of the property,) except "as holders of the obligations hereinafter mentioned," are 135
made parties, nor in any way called in. Such creditors consequently were not in position or able to dispute the taking away of all this property from whatever claims they may have had upon it for the payment of such debts as may have been due to them.

The Special Master distinctly finds as a conclusion of fact, "this claim (the theory that the mortgages were intended to secure payment of these bonds, and that the bonds became a lien thereby upon the mortgaged premises to the extent of the amounts due thereon) cannot, in my judgment, be sustained. 136
* * After a careful examination of the mortgages and the agreement which they secure, I can find nothing to warrant the conclusion that they were executed for the purpose of securing the bonds, or conferring a distinct and independent lien on the holders thereof." This fact is concurred in by the Circuit Judge, and the Master's conclusion confirmed, and the plaintiffs acquiesce in it, and do not appeal.

It is usual to add to the prayer of the bill a general prayer of that relief which the circumstances of the case may require; that if the plaintiff mistakes the relief to which he is entitled, the 137
Court may yet afford him that relief to which he has a right. Indeed, it has been said that a prayer of general relief, without a special prayer of the particular relief to which the plaintiff thinks himself entitled, is sufficient; and that the particular relief which the case requires may, at the hearing, be prayed at the bar. But this relief must be agreeable to the case made by the bill, and not different from it; and the Court will not, in all cases, be so indulgent as to permit a bill framed for one purpose to answer for another, especially if the defendant may be surprised or prejudiced. If, therefore, the plaintiff doubts his title 138

to the relief he wishes to pray, the bill may be framed with a double aspect; that if the Court determines against him in one view of the case, it may yet afford him assistance in another.

Milford's Plead., 4 Am. Ed. (38).

1 Daniel's Chan. Pr., 3 Am. Ed., 383, 384, 385, 386.

Story Eq. Plead. § 40, 41, 42; Mad. Chan. Pr., 2 Am. Ed., v. 2, p. 171.

In Colton *vs.* Ross, 2 Paige Ch. R., 397:

139 Chan. Walworth. There is no doubt of the right of a complainant in certain cases, to frame his bill with a double aspect, where it is doubtful what relief he may be entitled to on the facts. In such a case the prayer for relief may be in the alternative; but the relief must always be consistent with the case made by the bill. Here the complainants claim, as heirs at law and next of kin of the testator, under a positive allegation, that no valid will was ever made. That part of the prayer which is for special relief, if the Court should be satisfied there was a
140 valid will, is therefore wholly incompetent with the case made by the bill. Another substantial objection is, that the prayer for relief in this case is not in the alternative; but the last part of the relief prayed for is in addition to the prayer that the will may be declared void. Where the case made by the bill may entitle the complainants to one kind of relief or another, but not to both, the prayer should be in the disjunctive. So, if the complainant is in doubt whether the facts of his case entitle him to the specific relief prayed for, or to relief in some other form, his prayer, concluding for general relief, should be in the disjunctive.
141 And in such a case, although he is not entitled to the relief specifically prayed for, he may, under the general prayer, obtain any other specific relief, provided it is consistent with the case made by the bill. But if a complainant prays for particular relief, *and* other relief in addition thereto, he can have no relief inconsistent with such particular relief, although founded upon the bill.

It sometimes happens that the plaintiff, or those who advise him, are not certain of his title to the specific relief he wishes to
142 pray for, it is, therefore, not unusual so to frame the prayer, that

if one species of relief sought is denied, another may be granted. Bills with a prayer of this description, framed in the alternative, are called bills with a double aspect.

1 Dan. Ch. Pr., 387.

Can this bill be called one with a double aspect? The whole theory is based on a lien created by the indemnity mortgages directly in favor of the bondholders. The theory in the bill is reported against by the Special Master, his conclusion concurred 143
in, and confirmed by the Circuit Judge, and acquiesced in by the plaintiffs. Does there appear on the face of the bill anything which looks to a subrogation of the plaintiff, in the place of the mortgagees Trenholm and Welsman? If there does not, then the bill was not framed with a double aspect; the prayer is conjunctive, not disjunctive; the general prayer must be considered to be for relief in the line of the theory of the bill, to wit: a direct lien in favor of the bondholders; and granting relief, under the general prayer, is inconsistent with the particular relief prayed, or warranted by the case made by the bill. 144

In Hiern *vs.* Mill, 13 Ves. 119.

Lord Eldon. "The rule is, that, if the bill contains charges putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer; but he cannot desert specific relief prayed, and under the general prayer, ask specific relief of another description, unless the facts and circumstances, charged by the bill, will, consistently with the rules of the court, maintain that relief."

It appears by the pleadings that George A. Trenholm and 145
James T. Welsman were both dead at the time of the filing of the bill; consequently, the manner and order in which their debts were to be paid, and the assets of their respective estates administered, was fixed by the laws of their domicil, South Carolina; this bill therefore, was necessarily framed upon the theory of a mortgage directly in favor of the bondholders; if upon any other theory, it directly interfered with the rights of all other creditors of those estates. It will, hence, be seen why, in framing the bill, this theory is so persistently pressed on the court. If it had been framed upon a theory of administering 146

equities arising through those estates, necessarily the creditors of such estates must have been called in, because it would have been a bill for marshalling the assets, in fact, to which all creditors should have been called in. It is apparent therefore why the bill was framed on that theory; and the plaintiff having chosen his particular remedy and prayed it, and it having been found against him, and he having acquiesced in such finding, he must stand to what has been done on this point.

147 It is therefore submitted to this court, that if the foregoing part of this argument is correct, the decree of the Circuit Court should be reversed.

This naturally leads to the next question which it becomes our duty to discuss, viz: Whether, if relief could be granted under the general prayer for relief, the case as made by the plaintiff was one which entitled him to relief by subrogation?

148 The Special Master in his report, transcript, fol. 146, says: "As the Court cannot consider the instruments as giving a lien beyond this intent, it follows that the bond holders have no lien of their own; the most that they can claim is to be subrogated to the rights of their debtors, and to assert a quasi lien by administering the equities between Welsman and Trenholm. This equity of the creditors rests upon the principle first announced in Maure *vs.* Harrison, 1 Eq. Cas. Ab., 93; in which it was held that a bond creditor shall have, in a Court of Equity, all counter bonds, or collateral securities given by the principal to the surety.

149 This was followed in Wright *vs.* Morley, 11 Ves. 22, and *ex parte* Waring, 19 Ves. 345; where it was laid down by Lord Eldon that securities given to a banker to indemnify him against certain acceptances enure to the benefit of the holders of the acceptances, not directly, but through the equity of the acceptor or those claiming through him to have these securities, applied in discharge of the acceptance. The same doctrine has been recognized repeatedly in all the Courts of England, and in this country. The form in which the question usually comes up is upon the claim for securities given by the principal debtor to

150 his surety, or to his creditor. In the present case the security

was not given by the principal debtor, but by the *co-surety*, but this circumstance is not sufficient to take the case out of the rule. The right of the creditor to lay hold, by proceedings in equity, of collateral securities given by the principal debtor to the security, is framed upon the equitable principle of subrogation, and such right is conceded to the creditor for the avoidance of circuity of action. This equity is quite as strong in favor of a *surety* (when the principal is insolvent), against *his co-surety. The present case falls clearly within the reason of the rule.*" 151

To such report, these appellants excepted, on the ground, transcript, fol. 173; "that under no principles of equity are, or can the bond holders be held entitled to the principle of subrogation in this case."

The exception was overruled, and the Circuit Decree confirmed the report as above.

We believe, and it is our duty to endeavor to shew, that the report is founded in error of law, and hence the Circuit decree confirming it is erroneous in law. 152

Again, it is necessary to advert to the fact that when this bill was filed, both George A. Trenholm and James T. Welsman were dead. If the bill had been framed upon any other theory than that the indemnity mortgages were a security directly in favor of the bondholders, then it would have followed that it was a bill for the marshalling of equitable assets; if for this purpose, it would equally have followed that *all* the creditors of both George A. Trenholm and James T. Welsman must have been called in.

Equitable assets are all assets which are chargeable with the 153 payment of debts or legacies in equity, and which do not fall under the description of legal assets. They are called equitable assets, because *in obtaining payment out of them they can be reached only by the aid and instrumentality of a Court of Equity. They are also called equitable for another reason, and that* is, that the rules of distribution, by which they are governed, are different from those of the distribution of legal assets.

1 Story Eq., §552, 1 Mitf. Chan., 586.
Fonblanque Eq., Bk. 4, Part 2, Chap. 2, §1, note "f."
Adams Eq. (254, 255.) 154

But in regard to equitable assets (subject to the exception already stated, " to wit : to recognize and enforce all antecedent liens, charges and claims in rem, existing upon the property, according to their priorities)." Courts of Equity, in the actual administration of them, adopt very different rules from those adopted in Courts of law, in the administration of legal assets. Thus in equity it is a general rule that equitable assets shall be distributed equally and *pari passu* among all the creditors, without any reference to the priority or dignity of the debts; for Courts of Equity regard all debts in conscience, as equal *jure naturali*, and equally entitled to be paid, and here they follow their own favorite maxim, that equality is equity. *Æquitas est quasi æquilitas.* And if the funds fall short, all the creditors are required to abate in proportion.

155

1 Story Eq., §554; 1 Mitf. Chan. 586.
Adams Eq. 252, 256, 257; Jer. Eq. 527.
1 Spence Eq. Jur. 421, 583.
Willard Eq., 562.

156

In this view of the case, the Circuit decree is erroneous in law. The decree found as fact that George A. Trenholm and James T. Welsman were dead before the filing of the bill; it found as fact, that " their estates are not in a condition to make payment of the bonds;" it found, as fact, that the mortgages were not intended to secure payment of these bonds, and that the bonds did not become a lien thereby upon the mortgaged premises to the extent of the amounts due thereon; and it reached and declared as its conclusion of law, that the most that they, the bondholders, can claim is to be subrogated to the rightsof their debtors, and to assert a quasi lien *by administering* the equities between Welsman and Trenholm.

157

Subrogation is a doctrine primarily of equity jurisprudence. The law of subrogation is the exercise of the equitable powers of the court, to afford a summary relief to a meritorious creditor, who might otherwise be subjected to loss by the operation of proceedings at law against the estate or funds of one who is indebted both to him and others. The equitable remedy is allowed only when it does not conflict with the legal or equitable rights of other creditors of the common debtor. The principle

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is one of equity merely, and will be carried out in the exercise of a proper equitable discretion, with a due regard to the legal and equitable rights of others.

Sheldon on Subrogation, §1, 4.
1 Story Eq.. § 665.

In an accurate and legal sense, all the personal property of the deceased, which is of a saleable nature, and may be converted into ready money, is deemed assets. But the word is not 159
confined to such property ; for all other property of the deceased which is chargeable with the debts or legacies of the deceased, and is applicable to that purpose, is, in a large sense assets.

1 Story Eq., § 531.

Assets are legal, or equitable. Of equitable assets, we have before spoken.

In a great variety of cases, the jurisdiction of Courts of Equity become indispensable, from the fact, that no other Courts possess any adequate jurisdiction to reach the entire merits, or dispose 160
of the whole merits. This must necessarily be the case where there are equitable assets, as well as legal assets ; and also, where assets are required to be marshalled, in order to a full and perfect administration of the estate, and to prevent any creditor, legatee or distributee, being disappointed of his own proper benefit by reason of prior claims, which may obstruct it.

1 Story Eq., § 550.

As to marshalling assets.

In the sense of the Court of Equity, the marshalling of assets 161
is such an arrangement of the different funds under administration as shall enable all the parties having equities thereon to receive their due proportion, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds.

1 Story Eq., § 558.

By the laws of South Carolina, A. A. 1791, 5 Stat. at Large, 169, a mortgage is made a mere chose in action—a security for a debt.

By the laws of that State, the enforcement of payment of a 162

mortgage is made only through the intervention of a Court of Equity. Except in a particular case provided for by Statute, and which is inapplicable here. If, therefore, either George A. Trenholm or James T. Welsman had, as against the other, an operative mortgage under these indemnity mortgages, a resort to the Court of Equity was necessary to enforce it. It was such an asset, especially under the circumstances and conditions of these mortgages, "that, in obtaining payment out of them, they
163 could be reached only by the aid and instrumentality of a Court of Equity."

A mortgage before foreclosure is completed is personal assets, and upon the death of the mortgagee vests in his executor or administrator.

Jones on Mort., § 700.
1 Hilliard on Mort., 286.

If assets, then the fund which results is applicable to the payment of debts; if strictly legal assets, the fund would be appli-
164 cable, subject to legal priorities; if equitable assets, the fund would be applicable to all the debts

The Circuit decree has declared that, under these mortgages, the bondholder had no lien, or legal priority, they not being "executed for the purpose of securing the bonds, or conferring a distinct and independent lien on the holders thereof. * * The bondholders have no lien of their own."

If the bondholders had no lien of their own, then, in the administration of the assets of these deceased guarantors, those who desired to invoke the assistance of the Court of Equity in aid of
165 the equitable doctrine of subrogation, and through such Court assert a *quasi* lien, were, in fact, asking the Court to marshal the assets: this was asking "such an arrangement of the different funds under administration as shall enable all the parties having equities thereon, to receive their due proportion, notwithstanding any intervening interests, liens, or other claims of particular persons to prior satisfaction out of a portion of these funds."

The administration of estates is a matter of equitable jurisdiction, and all persons having claims against the assets of an
166 estate, are held to have equities thereon, the adjudication of

which often calls for the nicest application of equitable principles. The case now under consideration is an illustration of this.

Goldsmith's Eq. (87); 1 Madd. Ch., 578; 1 Spence Eq. Jur., 583.

If we conceded that the Circuit decree was correct, in administering these assets, without having all the creditors of both deceased guarantors before it, which we assuredly do not, as appears from the preceding part of this argument: still the ques- 167
tions arise, were these bondholders entitled to be subrogated to the rights of the deceased guarantors? If entitled to be subrogated, to what rights were they entitled to be subrogated?

It is now proposed to consider the first of these questions, viz.:

Were these bond holders entitled to be subrogated to the rights of the deceased guarantors?

In chapter XIII, entitled "Marshalling of Securities," of Story's Equity, it is said:

§ 633. The general principle is, that if one party has a lien 168
on, or interest in two funds for a debt, and another party has a lien on, or interest in only one of the funds for another debt: the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, &c.

§ 634. The same principle applies to one judgment creditor, who has a right to go upon two funds, and another judgment creditor upon one only of them, belonging to the same debtor. The former may be compelled to apply first to the fund, which cannot be reached by the second judgment; so that both judg- 169
ments may be satisfied, &c.

§ 635. It is not improbable, that this doctrine, which under another form, had its existence in the Roman Law, and was therein called subrogation, or substitution, was derived into the jurisprudence of equity from that source, as it might well be, since it is a doctrine belonging to an age of enlightened policy, and refined, though natural justice. *In the Roman Law*, as we have already seen, *a* SURETY *upon a bond, or security paying it to the creditor, was* ENTITLED *to a cession of the debt, and a* SUBROGATION, *or substitution to all the rights and actions of the* 170

creditor AGAINST THE DEBTOR; *and the security was treated* AS BETWEEN THE SURETY AND THE DEBTOR, *as still subsisting and unextinguished.* And where one creditor had any hypothecation or privilege upon property as security for a debt, and another creditor had a like subsequent security upon the same property for another debt; there the latter, upon payment of the prior debt to the prior creditor, was entitled to a cession of the property, and to a subrogation to all the rights and actions
171 of the same creditor for that debt, &c.

§ 636. We here see the original elements from which our present system of equitable relief is, or at least might have been derived. The difference between the Roman system and ours is that our Courts of Equity arrive directly at the same result, by compelling the first creditor to resort to the fund over which he has a complete control, for satisfaction of his debt, and the Roman system substituted the second creditor to the rights of the first, by a cession thereof upon his payment of the debt.

In Chap. VIII., entitled "Account," of Story's Equity, it is
172 said, speaking of contribution, § 498. * * But in cases of suretyship, others of a very complicated nature may arise from counter-equities between some or all of the parties, resulting from contract or equities between themselves, or from peculiar transactions regarding third persons. Thus, for instance, though the general rule is, that there shall be a contribution between sureties by the rule of equality, that may be modified by express contract between them; and in such a case Courts of Equity will be governed by the terms of the contract in giving or refusing contributions, &c.

173 § 499. *Sureties* also have, as between themselves, a right to the benefit of all counter-securities, and often are placed *by way of substitution to the creditor* in all the equities, which the *creditor* himself had against third persons. * * Indeed the principle is general *that sureties who pay a debt shall be entitled to stand in place of the creditor*, as to all securities, funds, liens and equities, which he may have against other persons or property, on account of the debt, &c.

In Tothier Oblig., Part II, Chap. 3, Art. VIII, §5, it is said:
The debtor in solido who pays the whole, may avoid abso-
174 lutely extinguishing the debt, except as to the part for which he

is liable on his own account, without having any remedy over. He has a right to the cession of the actions of the creditor against the other debtors, and by the cession of actions he is considered in some degree as purchasing the right of the creditor.

The debtor in solids who, on paying the debt, requires a subrogation, is, as to the surplus, beyond his own share, subrogated not only against his co-debtors, but also against their sureties, *if they have given any to the creditor*, he is likewise subjected to 175
all the privileges and rights of hypothecation attached to the actions of the creditors, and he may even exercise them against third persons in the same manner as the creditor to whom he is prosecutor *in rem suam* might have done.

In the same author, Part II, Chap. 6, Art. IV., it is said:

A third benefit which the law allows to the surety is, that when he pays he may require of the creditor to subrogate him to all the rights, actions and hypothecations, as well against the principal debtor for whom he has become surety as against all the other persons who are liable for the debt. 176

In Domat. Civil Law Bk. III., Tit. I, Sec. VI, it is said:

The substitution which we treat of here is nothing else but that change which puts another person in the place of the creditor, and which makes the right, the mortgage, the privilege which a creditor has to pay the person that is substituted to him, that is to say, who enters into his right.

We must take notice, in the last place, of another sort of substitution, which is acquired without any assignment from the creditor, without the consent of the debtor, and without an order of the Judge; but only by the bare effect of the payment 177
to the creditor.

The above authorities are cited to shew the origin of the doctrine of subrogation.

The citations from the writers on the Roman civil law, limit subrogation to the surety who has paid the debt of his principal, and all the text of these writers confines the doctrine to the surety.

Justice Story, in his able treatise on the equity jurisprudence, as above quoted, is also clear in confining the doctrine to the surety. It is true that on the authority of Wright *vs.* Morley, 178
11 Ves., 22, he extends the doctrine thus:

§ 638. * * And on the other hand *if a principal has given any securities to his surety, the creditor is entitled to all the benefit of such securities in the hands of the surety, to be applied in payment of his debt.*

How far Wright *vs.* Morley is operative in the United States Courts, as the enlargement of the original principle, will be considered in a later part of this argument.

In note 2, p. 268, to Adams' Eq., 4 Am. Ed., the annotator
179 says:

"Another consequence flowing from the relation of creditor and surety, may be mentioned here, which is the right of the former to be subrogated to, and to avail himself of all the securities held by the surety." The authorities cited in support of this, are chiefly from various State reports; the English cases "Dering *vs.* Earl of Winchelsea, and Yonge *vs.* Reynell, will be examined when we come to consider Wright *vs.* Morley.

In Sheldon on Subrogation, it is said:

§ 1. Subrogation is a doctrine primarily of equity jurispru-
180 dence. * * * It is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditors in relation to the debt. The substitute is put in all respects in the place of the party to whose rights he is subrogated. It is derived from the civil law, from which it has been adopted by Courts of Equity. In this country, under the initial guidance of Chan. Kent, its principles have been more widely developed, and its doctrines more generally applied than in England. It is treated as the creature of equity, and is so administered as to secure real and essential
181 justice without regard to form, and is independent of any contractual relations between the parties to be affected by it, &c.

§ 3. Subrogation, as a matter of right, independently of agreement, takes place only for the benefit of insurers; or of one who being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; *or of a co-obligor or* surety, who has paid the debt which ought, in whole or in part, to have been met by another; or of an heir who has paid the debts of the succession; or of one who has paid his own
182 debt, the burden of which has, for a valuable consideration, been assumed by another, &c.

§ 11. In short, the doctrine of subrogation is, that when one has been compelled to pay a debt which ought to have been paid by another, he is entitled to a cession of all the remedies which the creditor possessed against that other. To the creditor they may have been both equally liable; but if, as between themselves, there is a superior obligation resting upon one to pay the debt, the other, after paying it, may use the creditor's securities to obtain reimbursement. The doctrine does not depend upon priority; nor is it confined to cases of suretyship. It is a mode 183
which equity adopts to compel the ultimate discharge of a debt by him, who, in equity and good conscience, ought to pay it, and to relieve him whom none but the creditor could ask to pay, &c.

In considering the right of subrogation as between co-sureties, the same author lays down as principles:

§ 141. Co-sureties entitled to the benefit of securities held by each other.

§ 142. A surety cannot have contribution from his co-sureties without accounting for such security.

§ 143. A surety holding security regarded as a trustee thereof 184
for his co sureties.

He then considers the right which the creditor has to be subrogated to the benefit of the security for the debt held by a surety, and says:

§ 154. A creditor has also an equitable right to be substituted to the benefit of any collateral security for the debt *which the principal debtor has given to his* surety. * * * The creditor is, in equity, entitled to the benefit of collateral security for the payment of the debt *taken by a surety from the principal debtor*, although he did not originally rely upon the credit of such 185
security, or even knew of its existence. The creditor and the surety have correlative rights; they are each entitled to the benefit of the securities held by the other for the payment of the debt. The creditor may, if necessary, compel the surety to surrender to him any peculiar means which may have been entrusted by *the principal debtor to the surety* for the purpose of securing the payment of the debt, such as a mortgage on real or personal property, or any other collateral security held by the surety.

The English authority cited by the author in support of this section is Maure *vs.* Harrison: the case relied upon by the 186

special master in this case, as enunciating the principle upon which he reaches his conclusion of law; and since the Circuit Judge confirmed the report, it is to be presumed that the Circuit Judge also relied upon it. We will consider Maure *vs.* Harrison in a later part of the argument. All the other cases cited by the author are from various State courts.

§ 155. The security for the debt in whosoever hands it may be, is treated as a fund held in trust for the payment of the
189 debt; if it is in the hands of the creditor, the surety, upon paying the debt, will be subrogated to it for his indemnity; if it is in the hands of a surety, the creditor may resort to it to secure the payment of his demand. Equity regarding the security as a trust fund created for the payment of the debt, will compel the surety to apply it for that purpose; and a voluntary transfer of such a security held by the surety, to the creditor, will be upheld as if it had been made under a decree of the Court. The effect of a mortgage, or other security, given by the *principal debtor to his surety*, conditioned that the principal
190 will himself pay the debt, and hold the surety harmless therefrom, is to create a trust and an equitable lien for the creditor; and the surety will hold the property subject to such trust, even though his own liability may have been defeated by his decease, or by the oporation of the Statute of limitations, or by indulgence given by the creditor to the principal debtor. The surety cannot defeat this trust by a conveyance of the property, except it to be a *bona fide* purchaser for value without notice; and the record of such a mortgage of real estate will be constructive notice of the trust, so that creditors of the surety or purchasers
191 from him, even after his foreclosure of the mortgage, cannot, by means of an attachment or conveyance of the property, take it discharged of the trust; nor will it be defeated by the subsequent insolvency or bankruptcy of the principal and the surety, or either of them. The effect of such a mortgage is in equity to pledge the property to the surety for the payment of the mortgagor's debt; and the pledge is not redeemed, nor the equitable lien discharged, until the debt is actually paid. The surety cannot himself discharge the trust, or relieve the property from the burden to the prejudice of the creditor. He may
192 obtain security for the creditor, but he cannot discharge it.

Treating of the measure of the creditor's right, it is said:

§ 157. It is generally considered that while the creditor has the right to be substituted to the place of a surety in a case in which the creditor has given indemnity to the surety, yet the creditor's right must be measured by that of the surety; *and the surety's right to which the creditor will be substituted, must be determined by the instrument which creates it, &c.*

§ 163. The broad doctrine has been often asserted, that equity will regard security given by a principal debtor to his surety, 193
though merely for the surety's indemnity, as a trust created for the payment of the debt, and will see that it is applied for that purpose, by substituting, if necessary, the creditor to the benefit. So it has been held that in chancery, if a creditor applies to be substituted to the right of a surety, a fund pledged by the principal for the indemnity of the latter will be applied directly to the payment of the debt, if the surety is liable for its immediate payment, and could, upon his payment, resort at once to this fund for his indemnity, &c.

§ 165. A creditor of a mortgagee may, by substitution in 194
equity, avail himself of the rights of the mortgagee under his mortgage, when it was made to secure the debt which he is seeking to recover, and which is due to himself; *yet he cannot do so unless the mortgage was made to secure that very debt, &c.*

In these extended quotations, possibly so extended as to have fatigued the Court, it may appear as if the authorities were adverse to these appellants. We, however, think they are not, and prefer to give them thus fully, in order that the appellees may have the benefit of the fullest support which they could possibly claim; and will endeavor to show that none of these 195
citations are of avail to them.

Story — the annotator to Adams,—Sheldon, all concur in the principles to be found in Pothier and Domat, to wit: that subrogation arises out of the relation of principal and surety; that the surety is entitled to be subrogated to the securities which the principal has given to the creditor; and Story, the annotator to Adams, and Sheldon, so extended it that the creditor is entitled to be subrogated to the securities which the principal gave to the surety. It is true that Sheldon says, at §3, "or of a *co-obligor* or surety who has paid the debt which ought, 196

in whole or in part, to have been paid by another;" but at §157 the right is qualified thus, "and the surety's right to which the creditor will be substituted, must be determined by the instrument which creates it," and at § 165, he cannot be subrogated, "unless the mortgage was made to secure that very debt." When we come to discuss the indemnity mortgages, we hope to shew, that they were not made to secure the bondholders' "very debt," but were made to secure another kind of liability, which
197 liability must be determined by the instrument which created it. And we also hope to show from the report of the Special Master, confirmed by the Court, and acquiesced in by the appellees, that up to this time there has not arisen the liability to meet which such mortgages were made, and that such liability cannot possibly arise.

In an earlier part of the argument, it was said, that the cases of Wright *vs* Morley, Dering *vs* Earl of Winchelsea, and Maure *vs* Harrison, would be considered. And to these, since they are the authorities cited by the above commentators, and two of
98 them by the Master, it is now proposed to advert.

And first, as to Maure *vs* Harrison, since upon this case the Special Master relies for his deduction and conclusion of law. Of it, he says, that in it was first announced the principle that a bond creditor shall have in a court of equity, all counter bonds or collateral securities given by the principal to the surety.

Maure *vs* Harrison is found only in a volume entitled "A general abridgment of cases in equity, argued and adjudged in the high Court of Chancery, &c, with several cases never before published, &c." It purports to be edited by a gentleman of
199 the middle Temple, and he in his preface says: "As this work appears unrecommended by any authoritative approbation;" or even a name in the title page, which might introduce it with advantage, it will at once appear that the authority is not one upon which great reliance is to be placed.

The whole case is contained in these words:

"K. concerning Co-obligors and sureties.

5. A bond creditor shall, in this Court, have the benefit of all counter bonds or collateral security *given by the principal to the surety;* as if A owes B money, and he and C are bound for
200 it, and A gives C a mortgage or bond to indemnify him, B shall

have the benefit of it to recover his debt. Mich., 1692, beween Maure and Harrison."

Not a circumstance connected with the case is given, from which to form a conclusion whether there was anything peculiar which led to such a decision. Up to that decision, so far as we have been able to ascertain, the doctrine had been confined to subrogating the surety, who paid the debt, to the securities held by the creditor. It is true that we have had access only to Dickens. Reports in Chancery, Cases in Chancery, and Vernon, 201
of reports anterior to, or cotemporaneous with, the cases in Equity abridged. In reports in Chancery Bk., in Morgan *vs.* Seymour (120), Swain *vs.* Wall (150), and elsewhere, will be found the doctrine of the surety's right to subrogation, but in none have we been able to find the creditor's right to subrogation.

It is due to the editor of cases in Equity abridged to say, that Mr. Pooley, "an able lawyer of his day," is accredited as "the author of the first volume of the Equity cases abridged." But in Vidal *vs.* Guard's Ex'ors, 2 How., 193, Judge Story spoke of 202
all the earlier reports, as "certainly in no small degree shadowy, obscure and flickering."

The reporter being of such doubtful identity, and the report obnoxious to the imputation of Judge Story, while its meagreness is so patent upon its face, it is not inappropriate to ascertain, if we can, under what judicial administration such a departure, as it appears to us, from all former doctrine upon the subject was made.

In 1 Dickens Rep. p. *** vii., under the head of "a list of the Lord Chancellors," etc., it appears that from June, 1690, 203
to March, 1693, the great seal was in commission, and the Lords Commissioners were Sir John Trevor, Sir William Rawlinson, and Sir George Hutchins. The meagreness of the case as reported prevents it being said whether the case was decided by the three, or one or more, or none of them. But it is not an unfair inference that it was decided either by the three or by one of them. Lord Campbell, in Lives of Lord Chancellors, Chap. C. V., says: "Notwithstanding the complaints raised against the Court of Chancery under Ld. Com. Maynard, the King and his Ministers thought that the experiment of having 204

several co-ordinate Judges jointly to do the business there had not yet been fully tried, and a new Commission was issued, with Sir John Trevor as the head of it. Rawlinson, one of the former Commissioners, was continued, and Sir George Hutchins, another new one, was introduced, but though a sensible man and a good lawyer, he likewise was too obscure and uninteresting to deserve further notice." In a preceding chapter he spoke of Rawlinson as "a wholly uninteresting character," and
205 known only by his "accidental appointment." Of Sir John Trevor, he speaks as having "studied the law with much assiduity and rendered himself as well versed in all branches of his profession," but of his character, most contemptuously. Of the administration of justice by the three, he says, "but complaints had been multiplying against the administration of justice in the Court of Chancery, and these became so loud that they could be no longer neglected. Trevor was frequently absent on account of his political avocations; the other two were sometimes divided; when agreeing, their opinion did not carry much
206 weight." Sir John Trevor was ultimately declared by an unanimous vote of the House of Commons, guilty of a high crime and misdemeanor, in receiving a bribe while Speaker of the House.

If then Maure *vs.* Harrison is correctly reported, the question is very pertinent, was it a decision emanating from reliable judicial authority?

Whether Maure *vs.* Harrison was ever cited as authority prior to 1815, we are unable to say; from such examination as we have been able to give to the report, we cannot find that it ever
207 was. In 1815, in *ex parte* Waring, 19 Ves., 348, an authority relied upon by the Special Master, Lord Eldon said, referring to it, "And a case was cited, which goes that length with regard to that case, or cases in general. I desire it to be understood that I forbear to give any opinion upon that point."

Of Maure *vs.* Harrison, therefore, it may be said, that it was the enunciation of an extended doctrine of subrogation which had not previously appeared in the writers upon the civil law; that its meagerness forbids the ascertainment whether it did not turn upon some particular circumstance as in *Ex parte* Waring:
208 that it is from an unknown reporter, charged by an eminent

jurist of our day as in a class, "in no small degree shadowy obscure and flickering:" represented to be made under Judges against whose administration complaints had become so loud that they could be no longer neglected, and whose opinion did not carry much weight; and which, when cited before that eminent Chancellor, Lord Eldon, led him to say, "and a case was cited which goes that length, with regard to that case, I desire it to be understood, that I forbear to give any opinion upon that point." 209

It is submitted, that Maure *vs.* Harrison, standing alone, upon its own merits, does not come clad in armor of proof. And since it is the chief authority cited in § 154 of Sheldon, it must be taken subject to the above criticism as to its value as an authority at all.

Judge Story, at § 638, cites Wright *vs* Morley as the leading authority on which depends the doctrine of the right of the creditor to be subrogated to the securities held by the surety.

Wright *vs.* Morley, and Morley *vs.* St. Alban, 11 Ves., 21, wes decided by Sir William Grant, Master of the Rolls, November, 1805. 210 The circumstances of the case were as follows: Edwards, by will, bequeathed £4000 to be invested in 5 per cent Bank annuties, and to permit his wife, during her life, to receive the dividends, and after her death the stock to be sold and divided between his children: the widow Edwards married St. Alban, and he contracted, by indenture, in which the above facts were recited, with Dyer for the purchase of an annuity to be paid during the joint lives of Alban and his wife, to secure this, Alban, with Wright as surety, became jointly and severally bound to Dyer, and Alban sold and assigned to Dyer the interest, 211 &c., which should accrue. Bank annuities in which the £4000 had been invested, in trust to retain said annuity, and pay the residue to St. Alban: St. Alban gave a bond of indemnity to Wright, the surety, and afterwards went abroad: the trustees under Edward's will refused to make any payment under the grant of the annuity: Wright, the surety, having paid Dyer, filed a bill against the trustees, charging that Mrs. St. Alban had consented to the grant and assignment, and prayed that the trustees be decreed to repay what he had already paid, and to provide for future payments. Mrs. St. Alban admitted her consent to the 212

consignment, but said it had been obtained while she was under coverture, and she had filed her bill, (Moley *vs.* St. Alban) for an account of the accrued dividends, and as her husband had left the kingdom without providing for her maintenance, she prayed they be applied to her maintenance. The points made in the case were, on behalf of Wright, the surety, that under Edward's will, St. Alban, the husband, had a right to take *jure mareti*, and therefore the wife could not resist Wright's claim.
213 On behalf of Mrs. St. Alban it was maintained that as St Alban could only obtain the assistance of the Court by making a settlement, any one claiming under him, must make a settlement before the Court would give its assistance in taking away the wife's property. Upon this point the Master of the Rolls doubted. He required further argument upon the point whether Wright, the surety, could maintain the suit. Upon such argument he held that any one claiming under the husband would be entitled to the equitable interest for life of the wife, as well as a capital sum, subject to the equity requiring a provision for
214 her out of it, and hence Wright, the surety, was subrogated to the husband's rights. He then said, "the question then is, whether the Court will act upon that assignment *at the instance of the surety in whose favor it is not made. The surety* is the only plaintiff. The annuitant, who has the assignment of the dividends, does not join. At the hearing I thought the plaintiff entitled to the equity he seeks. Afterwards I had some doubt; but I adhere to my first opinion. I *conceive, that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good*
215 *an equity to the benefit of all the securities the principal gives to the creditor.*"

It will be thus seen that the question in this case was the right of the surety to be subrogated to the security held by the creditor, and not the creditor's right to be subrogated to the security held by the surety. The words "as the creditor is entitled to the benefit of all the securities the principal debtor has given to the surety," is *obiter dicta*, not involved in the case, apparently not argued, not supported by any authority given by the Master of the Rolls; on the contrary, the authorities cited
216 by him relate wholly to the sureties right to subrogation, a doc-

trine going back to the reports in Chancery, and very repeated, and being given as the reason why the surety should be subrogated, instead of vesting that right on the abundant preceding authorities, both of commentators and cases, may well allow the authority of each obiter to be doubted. And this, the more especially as Lord Eldon, ten years later, when Maure *vs.* Harrison, the only case concurring with the Master of the Rolls in such obiter, was cited before him as authority, and in a cause in which properly it could have been relied upon if deemed sound 217
law, said, "with regard to that case, I desire it to be understood that I forbear to give any opinion upon that point."

We submit that Wright *vs.* Morley does not warrant the words used in § 638 of Story's Eq., or if it does, it is so doubtful an authority that until more clearly recognized upon the particular obiter, it cannot be relied on as enlarging the ancient doctrine and theory of subrogation.

In the case now under argument, it is the second authority relied upon by the Special Master in support of his conclusion of law. We now submit that it is as unsubstantial as Maure *vs* 218
Harrison, the first case relied upon.

Dering *vs.* Earl of Winchelsea, which is cited by the annotator of Adams, is to be found in 2 Bos. & Pul, 270, and relates wholly to contribution between co-sureties. It is the text for an elaborate note in White's leading cases in Equity, vol. 1, p. 60. At top page 101, is to be found the commentary on which the annotator relies; it is, "In like manner, the principal creditor is in equity entitled to the full benefit of the security given by the debtor to the security for his indemnity and for the discharge of the debt, and it makes no difference that such principal creditor 219
did not act upon the credit of such security in the first instance or even know of its existence. Maure *vs.* Harrison, 1 Eq. Ca. Ab. 93, pl. 5; Wright *vs.* Morley, 11 Ves., 12, 22." The other cases cited are from American State Reports.

We are, therefore, brought back to the original cases of Maure *vs.* Harrison, and Wright *vs.* Morley, which have been above examined.

Ex parte Waring, 19 Ves., 345, decided by Lord Eldon, in 1815, more nearly approaches the doctrine that the creditor is entitled to be subrogated to the securities held by the surety, 220

but if we understand the decision, it repudiates the doctrine as a principle, but applies it because of a peculiar equity in the particular case. The contest was between persons holding bills accepted by a firm, which bills had been drawn on them by another firm and to secure which acceptances the title deeds of certain premises had been left with the acceptors, and the assignees in bankruptcy of the firm which drew the bills and gave the security. Both the drawers and acceptors were in bank-
221 ruptcy. The argument as submitted on behalf of the creditors, the bill holders, was "the subjects for consideration, are, first, whether the bill holders have not an equitable claim upon this property; if not, secondly, whether the assignees of Brickwood, (the acceptor) have not a right to have it applied, to exonerate their estate from the proofs upon their acceptances on account of the Brackens (the drawers). Thirdly, whether the general creditors have not a right to insist that these particular creditors should be satisfied out of the appropriated fund." And Maure *vs.* Harrison, and Wright *vs.* Morley, were cited in support of
222 their position. In pronouncing his judgment, Lord Eldon said:

"With regard to that case, or case in general, I desire it to be understood that I forbear to give any opinion upon that point; *but I see nothing in this transaction, which, supposing a bankruptcy had not occurred, would entitle those who are creditors by the acceptances of the bankers, having these deposits, to maintain an equity upon them; the effect of which would be, that from the moment of that deposit the bankers would become trustees for those creditors; and could not come to*
223 *any new arrangement with those whose debts are to be so discharged. That doctrine, therefore, not being applicable to this case, the view I have taken of it in other respects is this.* The first consideration is, what was the nature of the demand of Bracker & Co., who did not become bankrupt until August, upon Brickwood & Co., at the moment of their bankruptcy, on 7th July. If these bill-holders are to have payment in preference to the other creditors, it must be by the effect of an equity between those two houses, rather than by any demand directly in their own right upon any fund in the hand of Brickwood & Co. With regard to the
224 demand of Bracken's house upon 7th July, it is impossible to

to deny, that if they had either paid, or undertaken to pay, *i. e.*, to relieve Brickwood's house from these acceptances, the short bills and the mortgage (the security) must have been restored to them. It is on the other hand equally clear, that they never could have raised any demand against the house of Brickwood in respect of either the cash balance, the short bills, or the mortgage, without bringing in the amount of those acceptances: admitting that what the house of Brickwood had of their property in short bills, &c., must be first applied to the discharge of 225
these acceptances, for the sake, *not of the bill holders*, but of the house of Brickwood, who had become liable to them; and had a right to have that liability cleared away before any demand could arise for the Brackens. *That then being the equity between these two houses in the interval between their respective bankruptcies, it does not appear to me to be varied by the bankruptcy of the Brackens in August; supposing their assignees to have put the estate of Brickwood in the same situation as the house they represent, if solvent, must have done, to entitle themselves to the short bills, and having regard to the demands of all the creditors and the* 226
bankrupts, in this circuitous way, I think the bill holders must be paid, NOT AS HAVING A DEMAND UPON THESE FUNDS IN RESPECT OF THE ACCEPTANCES THEY HOLD, BUT AS THE ESTATE OF BRICKWOOD & CO., MUST BE CLEARED OF THE DEMAND BY THEIR ACCEPTANCES; and the surplus, after answering that demand, must be made good to Bracken & Co.," &c.

We submit that *ex parte* Waring does not, in principle, support the deduction or conclusion of law reached by the Special Master, and confirmed by the Circuit decree. We allude to the conclusion, that the creditor is entitled to be subrogated to the 227
security held by the surety. It is also submitted, that the conclusion being deduced from such uncertain case as Maure *vs* Harrison from a new obiter in Wright *vs* Morley; both of which appear to be repudiated as principles, by *ex parte* Waring; and *ex parte* Waring being decided apparently upon another point, and on its own circumstances, it was error in the report to reach the conclusion of law which it did, and it was error in the Circuit decree to adopt and confirm it as law.

It has been previously said, that it may be questioned, how far Wright *vs* Morley was operative in the United States Courts. 228

In rule 3 of the Supreme Court, it is prescribed that "this court considers the practice of the Courts of * * Chancery in England, as affording outlines for the practice of this court.' In Payne *vs* Hook, 7 Wall, 430, it is said, "the equity jurisdiction conferred on the Federal Courts is the same that the High Court of Chancery in England possesses." But by no statute, decision or rule, has this Court ever been, and we feel assured it never will be held, blindly to follow decisions made in the
229 English Courts, unless such decisions meet its concurrence and approval. And it will be the less influenced by a case of so doubtful authority as Maure *vs* Harrison, or a mere obiter, uncalled for, unsupported, and apparently doubted by the highest judicial officer of the kingdom in which such obiter was made. Had the Supreme Court of the United States by any decision adopted the principles of such case, and obiter, we should have been debarred from this appeal, on the doctrine of *stare decisis*. But the questions of subrogation decided in this court have been singularly few, and chiefly upon official bonds or insurance
230 cases. We have failed to find a single decision of this court upon the subject now under discussion, and regard it as one entirely open for the adjudication of the court. The Bk of the U. S. *vs* Peter, 13 Pet., 123, goes on the principle that a junior mortgagee paying a prior mortgage, to obtain the benefit of his own, comes in as assignee of that which he had paid.

But the Circuit decree is shown to be erroneous. We submit, in attaining, as its conclusion of law, that the bond holders are entitled to be subrogated under these indemnity mortgages, by the instruments themselves.

231 The principle laid down in § 157 of Sheldon, that "the creditor's right must be measured by that of the surety, and the surety's right to which the creditor will be substituted, must be determined by the instrument which creates it," is so apparently the true and only equitable principle, that it needs no argument.

Now what were the instruments in this case, which created the right, if any were created, to which these bond holders claim to be subrogated.

The instruments are to be found in Transcript, fol. 179 to 216.

232 The mortgages recite the agreement, and declare "that for and in consideration of the premises, and *in pursuance of the afore-*

said memorandum of agreement between the said James T. Welsman and the said George A Trenholm, *bearing even date with these presents*, and in order *to secure* the said George A. Trenholm, the *due performance of the same and of the covenants therein contained*, and in further consideration of the sum of five dollars to me in hand paid by the said George A. Trenholm, at and before the ensealing and delivery of these presents, I, the said James T. Welsman, have granted," &c.; fol. 191, 203. "Provided, &c., that I, the said James T. Welsman, 233
my heirs, executors or administrators, shall well and truly perform the said covenants, agreements and understanding *contained in the said memorandum, bearing even date with these presents*, and hereinbefore described in manner and form as the same are in the said memorandum set forth and declared, according to the true intent and meaning of the said *memorandum last named*, then these presents shall be null and void; otherwise shall remain in full force and virtue," &c.; fol. 198, 215.

At fol. 7, in the statement of the bill, will be found as follows: "and would secure to the holders of the said bonds the 234
proportion of the sums assumed by each of them, the said Geo. A. Trenholm and James T. Welsman; for the payment of which said proportion each would and did execute to the other certain security by way of mortgage, as hereinafter specially set forth." This statement purports to be by an agreement made "at the time of the execution of the aforesaid guarantees." If therefore, by such statement it is meant to charge, that there was a prior or other agreement by which the guarantors "would secure to the bondholders," the reply is, that it does not in any way appear in the written and sealed agreement to secure the 235
performance of the covenants whereof the indemnity mortgages were made. And the bondholder claiming any right under the mortgages, must take such right only as the mortgages provided.

What is the agreement which the mortgages provided for? It is at page 92. And recites an agreement by Theodore D. Wagner and William L. Trenholm, on 25th November, 1867, with the several parties creditors of John Fraser & Co, and of Fraser, Trenholm & Co., whose names are signed to the agreement, by the third article of which it was agreed, that Wagner 236

and Trenholm should execute bonds for $710,000, "*secured by a personal guaranty and endorsement*, to be approved by the said trustees;" that said bonds have been executed by Wagner and Trenholm, "and the said George A. Trenholm and James T. Welsman have become bound by *such personal guaranty and endorsement*, and have been approved by the said trustees;" that the said agreement for a completion required a supplemental agreement, by which George A. Trenholm and James T. Wels-
237 man were to guarantee certain bonds to be issued in consequence of a deficit; and Trenholm and Welsman have duly made and executed such obligation. "And whereas the said George A. Trenholm and James T. Welsman in being bound by the said guaranty and endorsement provided in the third article of the agreement of 25th November, 1867, *did between themselves agree that the limit and extent of the amount for which each of them would respectively, be liable*, should be as follows: that is to say, of the said sum of $710,000, that the said G. A. T. should be liable for the sum of $400,000, and the said J. T. W.
238 for the sum of $310,000, and that in the obligation to be given under Article 2 of the said memorandum of final settlement of 16th November, 1868, the said G. A. T. should be liable for 40 of 71 parts thereof, and the said J. T. W. should be liable for 31 of 71 parts thereof, *and the said G. A. T. and J. T. W. have become parties* to such guaranty and endorsement, and have executed such other obligation *with the clear understanding and agreement that each would be respectively liable to the other for the full discharge of the said sum and the said proportion by them respectively undertaken, and that each would save and keep harm-*
239 *less and indemnified the other from all claim, demand and damage, for or by reason of the said guaranty and endorsement, and of such obligation beyond the amount or proportion by each respectively assumed as hereinbefore stated. And whereas the said G. A. T. and J. T. W. have*, in all respects, and from the creation of such liability on them respectively, fully and in good faith, *intended to keep each the other indemnified from all claim, demand and damage*, and in further pursuance thereof *did agree* by proper conveyances, by *way of mortgage* or otherwise, if so advised, to transfer each to the other, such property to them
240 respectively belonging, *as would secure each against the other*

from all claim, demand and damage as hereinbefore stated. And whereas it is fit and proper that such understanding and agreement between them shall be, in all respects, made certain by this memorandum in writing, *now*, therefore, *the said G. A. T. and J. T. W. do*, severally, and each, by his execution of these presents, *agree* and declare *that all that is hereinbefore recited* and set forth fully and truly, *recites and sets forth the understanding and agreement made and now subsisting between them* in relation to the said guaranty and endorsement, and the other 241
obligation by them made, *and particularly that it does fully and truly recite and set forth the amounts and proportions for which each as to the other is respectively liable because of the said guaranty and endorsement*, and the said obligation by them made and undertaken, *and that each is as to the other bound fully to discharge and satisfy such amount and such proportion as is hereinbefore recited and set forth*, as so undertaken by each as the amount or proportion for which he is liable, *and that each will save and keep harmless and indemnified the other from all claim, demand and damage for or by reason of the amount or* 242
proportion so undertaken by him. And the said G. A. T. and J. T. W. do further agree that at any time when the other shall so require, each shall, by proper conveyance and by way of mortgage, secure to the other any or all of the real estate of which each may be seized, and such mortgage shall be held by each for his more perfect indemnity, because of the said guaranty and endorsment, under the said memorandum of agreement of 25th November, 1867, and other obligation under the said memorandum of final settlement of the 6th of November, 1868." 243

The bond holders were to be secured by a personal guaranty and endorsment, that was all they bargained for, and is all they are entitled to under their agreement. The guarantors being jointly and severally bound for the whole, by their agreement, fixed the amounts as between themselves, for which each should be liable; and to indemnify each the other against paying a larger amount, gave security for the repayment of the excess which either should be obliged to pay over the agreed amount. This was not Wagner and Trenholm giving security to Trenholm and Welsman, the guarantors, and therefore making Tren- 244

holm and Welsman guarantees for the creditors. It was two principals agreeing between themselves as to the amounts for which each as between themselves should be liable, and protecting each other against a payment in excess of such amounts. As between Trenholm and Welsman when could these mortgages become operative? Clearly, Trenholm had no claim on Welsman under the mortgage to him, until he had paid over $400,000 of the B. bonds; nor had Welsman any claim on
245 Trenholm until he had paid over $310,000 of those bonds. Has Welsman paid over $310,000 of the bonds, so as to make the mortgage given to him by Trenholm operative? The answer of Welsman's executors, fol. 67, says: "That at various times since the guaranteeing of said bonds, their testater paid to the said George A. Trenholm, at his request, moneys amounting to $89,000, to be applied to the extinguishment of the obligations," &c. The executor, George A. Trenholm estimated the amount due by Welsman to Trenholm, on account of the latters payment of account of such guaranteed bonds, fol. 102,
246 as "considerably over $200,000—largely over that." The Executors of both guarantors, therefore, concur in the fact that Welsman had not only not paid over $310,000, his share, but was actually very far short of reaching that amount. If Welsman had no claim on Trenholm, whatever claim, if any at all, Welsman's creditors had, was to be measured by the instrument itself. Measured by the instrument, what was Welsman's claim on Trenholm? Nothing. What can Welsman's creditors claim? Nothing! The Special Master, fol. 148, says, "It is a well established rule, however, that where creditors claim
247 the benefit of a mortgage, through the equities of the mortgage, they can claim only what the mortgagee, to whose rights they are subrogated, could have claimed." This is also the Circuit decree, unappealed from by the appellees, and binding on them. What were Welsman's equities under the mortgage? Was it that Trenholm's property should be liable for the whole debt? The agreement and mortgage answer distinctly, that Trenholm's property was to be liable for so much, only, as Welsman should pay in excess of $310,000. Welsman has not paid in excess, and if he and Trenholm were alive, and before this court
248 seeking an adjudication of the equities under the mortgage, the court could give but the one answer, You have none.

If our view is correct, then, since Welsman has not paid in excess, and cannot pay in excess, the mortgage given him by Trenholm is inoperative, and never has been, and never can be operative, so as to give Welsman any rights or equities under it. If it never has been, is not, and cannot ever be operative, so as to give Welsman rights or equities under it, it seems to follow as a sequence irresistible, that a creditor seeking to be subrogated to his rights or equities, which never have been, are not, and never can be in existence, can claim nothing at all. And it 249
equally seems to follow, that, since it is so inoperative, the property contained in the Trenholm mortgage to Welsman, must be liable to the claims of the appellants.

In a former part of the argument, it was said that, when discussing these mortgages, we hoped to show that up to this time there has not arisen the liability to meet which such mortgages were made, and that such liability can not possibly arise. This has been attempted in the Trenholm mortgage to Welsman, and will be as regards the Welsman mortgage to Trenholm. 250

The B and C bonds issued were $811,448; the whole of the C bonds, $101,448, have been retired (fols. 121, 143). The B bonds outstanding are $636,390 (fols. 144, 151), which would show that $74,000 B bonds, or thereabout, have been retired. Taking, therefore, the Special Master's figures, and allowing that the whole $74,000 were paid by Trenholm, it would be very far short of the $400,000 upon the payment of an excess over which only would the Welsman mortgage to him become operative. In no place in the testimony, except it may be by the statement at fol. 102, does it appear that G. A. Trenholm has 251
paid over $400,000, and if he has not, then he has no claim under the mortgage. A large sum was disbursed by Mr. Trenholm, which he received from the sales of the collaterals, and the amount so received was applicable equally for the benefit of Welsman himself. It will be seen, from the pleadings and in the testimony, how persistently the executors of Welsman sought to get an account of these collaterals, and how equally persistently the executor of Trenholm failed to give an intelligible one. What appears at fols. 121, 122, was one of the mysteries of book-keeping; it was not intelligible to us, and from the summary of 252

the Special Master, fol. 143, seemed equally unintelligible to him. But adopting his figures, and we find that $108,454.45 "has been paid by Mr. Trenholm out of his individual means." Now, following the same figures, there has been paid on B and C bonds $531,616.61, of which $423,162.16 was derived from collaterals; no allowance is made for the $89,000 paid by Welsman to him to be applied to the extinguishment of these bonds: if the receipts from the collaterals and the Welsman contribution
253 are put together, it will be found that it amounts very nearly to the $531,616 61. We have utterly failed to find anywhere that Trenholm paid in excess of the $400,000, and until it is shown that he did, the Welsman mortgage to him is inoperative.

A mortgage to a surety to secure him, is, in effect, a security to the principal creditor, and he is entitled to the benefit of it. If it be a mortgage of indemnity the surety cannot enforce it until he has been injured, or has paid the debt for which he was surety; and in like manner the security does not in the first instance attach to the debt, as an incident of it, but whatever
254 equity may arise in favor of the creditor with regard to the security arises afterwards and comes into existence only when the surety's right to call upon the security becomes fixed.

1 Jones, Mort., §726.

But if the sum for which the mortgage of indemnity is given be limited, the security cannot be extended beyond that amount.

1 Jones, Mort., §381.

It has been seen by the pleadings, testimony and report, that
255 Trenholm and Welsman were guarantors upon these bonds. As guarantors, if security had been given to them by the principal debtors, Wagner and Trenholm, under the authority of Chamberlain *vs* St. Paul R. R., 2 Otto, 299, the security so given would not have enured to the benefit of the creditors, because, being original debtors by their guarantee on the bonds, the relation of surety did not exist as to the bondholders; the security would have been for the benefit of Trenholm and Welsman, not as a trust in favor of the bondholders.

If Trenholm and Welsman were principals, and gave security
256 for indemnity to each other, under the above case, they were not

in the relation of sureties, and not standing in such relation, the indemnities between themselves were for their own benefit, and not as a trust for the creditors.

It is respectfully submitted, as the result of this argument, that the bondholders are not entitled to be subrogated to these indemnity mortgages; that even, if so entitled, they are to be subrogated only to such rights as the mortgagees had; that 257
under the mortgages the mortgagees could acquire rights only by payments in excess of their proportions; that in the case of Welsman, it is clearly shown he never did, and can not pay in excess, and hence has not and never can acquire any right under the mortgage to him; and that the bondholder, upon whom the burden of proof lay, has failed utterly to show that Trenholm ever has, or can pay in excess, and hence has not, and never can acquire any right under Welsman's mortgage to him.

The Circuit decree being to the contrary of this argument, it is respectfully submitted as erroneous, and should be reversed. 258

This argument has been so extended that we do not propose to weary the Court by further argument on the other grounds presented by the exceptions to the Special Master's report. We will therefore ask leave to read such portions as fol. 174, 177, 178, as will place the Court in possession of these, with such brief comments on each as time will permit.

DESAUSSURE & SON,

Attorneys of Executors James T. Welsman. 259

March 1883.

Wilmot G. De Saussure